Petition

Supreme Court, U.S.
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No. 81-1802

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEROY CARLTON KNOTTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

ANN T. WALLACE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the warrantless monitoring of a beeper to aid in locating a drum containing chemicals used to manufacture illegal drugs violates the Fourth Amendment.*

* In addition to the parties listed in the caption, co-defendant Darryl Petschen was a party to the proceedings below, but is not a respondent herein.

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LEROY CARLTON KNOTTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 662 F.2d 515. The opinion of the district court (App. B, *infra*, 12a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 18a) was entered on October 30, 1981. A petition for rehearing with a suggestion for rehearing en banc was denied on December 29, 1981 (App. D, *infra*, 19a). On February 17, 1982, Justice Blackmun extended the time within which to file a petition for

a writ of certiorari to and including March 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an indictment filed in the United States District Court for the District of Minnesota, respondent was charged, together with Darryl Petschen and Tristan Armstrong, with conspiracy to manufacture controlled substances, including but not limited to methamphetamine, in violation of 21 U.S.C. 846. Following a jury trial, respondent was convicted and was sentenced to five years' imprisonment.[1]

1. The evidence showed that on June 14, 1979, Agent Timothy Shanley, a narcotics investigator for the Minnesota Bureau of Criminal Apprehension, received information from the 3M Company, a chemical company in St. Paul, Minnesota, that co-defendant Armstrong, a former 3M employee, had been stealing phenylacetone and other chemicals that are essential precursors (starter materials) in the manufacture of amphetamine and methamphetamine (H. 2-3; Tr. 46-47, 196, 210).[2] A search of Armstrong's laboratory at 3M uncovered documents linking him to a residence on Leone Street in St. Paul, where, through visual surveillance, agents saw co-defendant Petschen

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[1] Co-defendant Armstrong pleaded guilty and was sentenced to three years' imprisonment, all but six months of which was suspended in favor of probation on the condition that he serve those six months on work release. Co-defendant Petschen was tried jointly with respondent. He was convicted and sentenced to five years' imprisonment.

[2] "H." refers to the transcript of the preliminary hearing, which the parties stipulated could be considered by the district court in ruling on the suppression motion (see May 28, 1980 Tr. 6-7). "Tr." refers to the trial transcript.

and others moving laboratory equipment and furniture into a truck (H. 3; Tr. 50-51, 57-58, 60-61). Thereafter, Agent Shanley examined the vacated premises with the landlord's permission (H. 4; Tr. 63-64). He found tubing, glassware and miscellaneous laboratory equipment amid several piles of garbage (Tr. 64). He also found a white powder which, upon analysis, was found to contain a chemical byproduct of amphetamine synthesis (H. 4; Tr. 65-66, 262).

Subsequent investigation revealed that Armstrong had been placing numerous orders for chemicals with the Hawkins Chemical Company in Minneapolis (H. 5; Tr. 73-74, 81-85, 89). When Agent Shanley was informed that on February 28, 1980, Armstrong was scheduled to pick up one such order from Hawkins, including a quantity of chloroform, Shanley obtained permission from the company to place the chloroform inside a five-gallon drum containing a beeper before delivery to Armstrong (H. 5-6; Tr. 100-101).[3] On the scheduled date, investigating agents observed Armstrong pick up the order and drive to co-defendant Petschen's residence in St. Paul, where the packages of chemicals were transferred to the back seat of Petschen's vehicle (H. 5-6, 11; Tr. 73-74, 102). The

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[3] A beeper, or electronic tracking device, transmits a radio signal that can be monitored by a radio receiver. The location of the beeper is determined by the strength of the signal and the direction from which it is received. Electronic tracking devices used by law enforcement authorities are of two types. The first type, a beacon transmitter, emits a constant signal of periodic short bursts of radio frequency power and is used on automobiles and packages of goods. The second type of device, a transponder, emits a signal only upon receipt of another designated radio signal. This latter device is used on airplanes and ships, where a beacon transmitter would interfere with navigation equipment.

agents followed Petschen as he drove his automobile into Wisconsin (H. 6; Tr. 104, 106-107). At times the agents lost sight of Petschen's vehicle and relied upon the beeper signal emitted from the drum to keep track of Petschen's whereabouts (H. 7; Tr. 103-104). During most of the surveillance Petschen drove at a steady pace of 55 miles per hour and did not appear to be trying to avoid detection (Tr. 104). At about 3:30 p.m., however, Petschen began making evasive maneuvers and the agents terminated their visual surveillance (Tr. 105). Approximately one hour later, the agents located the beeper signal in the vicinity of a cabin occupied by respondent Knotts near Shell Lake, Wisconsin (H. 7; Tr. 105, 108-109). The agents then established intermittent visual surveillance of respondent's property until the following day, when they saw respondent and Petschen leave the area (Tr. 107-108).

On March 3, 1980, federal and state agents obtained a warrant to search respondent's cabin and surrounding property. In the course of the search, they discovered a fully operable clandestine drug laboratory behind wall paneling in the cabin (H. 8-9; Tr. 143). In the laboratory area the agents found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine (H. 9-10; Tr. 160, 162-163, 272-274). Hidden under a barrel outside the cabin the agents located the five-gallon drum of chloroform in which they had placed the beeper (Tr. 173-174).

2. Prior to trial, respondent moved to suppress the evidence found in the search of his cabin. The district court denied the motion (App. B, *infra*, 12a-17a). The court first concluded that the installation of the

beeper with the consent of the chemical company "did not invade anyone's expectation of privacy and thus could not have violated the Fourth Amendment" (*id.* at 15a). The court then held that the subsequent monitoring of the beeper to determine the destination of the drum of chloroform did not violate respondent's Fourth Amendment rights because respondent could claim no legitimate expectation of privacy in the arrival on his property of a can of chemicals transported over public thoroughfares by another party (*id.* at 15a-16a). In addition, the court concluded that the monitoring of the beeper's signals for a brief period after the drum was deposited on respondent's property was not a "search" within the meaning of the Fourth Amendment (*id.* at 16a-17a). Accordingly, the court ruled that the subsequent warrant-authorized search of respondent's cabin based on information gained by use of the beeper was valid (*id.* at 17a).

3. A divided panel of the court of appeals reversed respondent's conviction (App. A, *infra*, 1a-11a).[4] Noting that the other circuits that have addressed the question have taken conflicting positions, the majority held that law enforcement officers must obtain a warrant before using a beeper to determine the location of noncontraband materials that have been placed in a private area or withdrawn from public

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[4] The court of appeals unanimously affirmed the conviction of co-defendant Petschen, whose suppression motion had also been denied by the district court. The court of appeals concluded that Petschen had no reasonable expectation of privacy in respondent's cabin (App. A, *infra*, 7a). Petschen filed a petition for certiorari (No. 81-6089) on January 1, 1982, seeking review of this ruling.

view (*id.* at 4a-7a).[5] The majority acknowledged that the courts have upheld the warrantless use of beepers as an aid to visual surveillance in tracking the route taken by an automobile over public roads, but it concluded that in this case the item to which the beeper was attached passed "into the private sphere protected by the Fourth Amendment" when the "beeper's signal was lost and found again only after the beeper-laden drum was on private property out of public view" (*id.* at 6a-7a).

Judge Henley dissented (App. A, *infra*, 8a-11a). He first expressed some doubt as to whether the monitoring of a beeper is a "search" within the meaning of the Fourth Amendment (*id.* at 8a). Even if the use of a beeper is a search, Judge Henley concluded that there can be no greater expectation of privacy in the location of chemicals intended for use in the manufacture of illegal drugs than in the location of known contraband, which an individual has no legal right to possess (*id.* at 8a-11a). In Judge Henley's view, the agents had probable cause to believe that the chloroform was intended for illegal use at the moment they saw co-defendant Armstrong load the chloroform into his automobile, and they thus could have seized the chloroform for immediate forfeiture under 21 U.S.C. 881(a)(2) (App. A, *infra*, 11a n.1). In these circumstances, Judge Henley concluded that "[respondent] had no legitimate expectation of privacy in the location of the chloroform that was violated by [the warrantless] monitoring of the beeper" (*id.* at 11a).

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[5] Citing the maxim *caveat emptor*, the court of appeals agreed with the district court that the initial attachment of the beeper with the consent of the company did not offend the Fourth Amendment, even though the company intended to sell the drum to an unsuspecting buyer (App. A, *infra*, 4a n.2).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of Fourth Amendment law. The holding of the court of appeals that a warrant is required before law enforcement agents may monitor radio signals from a beeper to locate an object that has come to rest on private property is, as the court below conceded (App. A, *infra*, 5a-6a), in direct conflict with decisions of the United States Courts of Appeals for the Ninth and Tenth Circuits. *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978); *United States* v. *Bernard*, 625 F.2d 854 (9th Cir. 1980); *United States* v. *Brock*, No. 80-1736 (9th Cir. Feb. 18, 1982); *United States* v. *Clayborne*, 584 F.2d 346 (10th Cir. 1978). Moreover, the decision in this case also appears to conflict with the decisions of numerous courts of appeals that have upheld the warrantless monitoring of beepers to track the movements of an automobile over public roads. The conflicting decisions of the lower courts in this area have engendered considerable uncertainty concerning the Fourth Amendment implications of using a beeper as an aid in surveillance of suspected criminal activities. This Court should grant review to resolve these conflicts and to decide the important question presented here.

1. Cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. In this case, both courts below concluded (App. A, *infra*, 4a n.2; App. B, *infra*, 15a) that the installation of the beeper inside the drum of chloroform with the consent of the chemical company did not violate the Fourth Amendment. This decision is in accord with the decisions of other courts

in similar circumstances.[6] The decision below, however, squarely conflicts with decisions of the Ninth and Tenth Circuits upholding the warrantless monitoring of beepers after the packages to which the beepers were attached had been removed from public view.

In *United States* v. *Dubrofsky*, *supra*, the Ninth Circuit upheld the warrantless monitoring of a beeper inside a package after it had been taken into a residence, concluding that a device that continually broadcasts "here I am" constitutes only a "slight" intrusion

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[6] See *United States* v. *Bernard*, *supra*, 625 F.2d at 860; *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). In analogous contexts courts have also held that no Fourth Amendment rights are infringed by the warrantless attachment of a beeper on property by an invitee (*United States* v. *Arredondo-Morales*, 624 F.2d 681, 684-685 (5th Cir. 1980); *United States* v. *Conroy*, 589 F.2d 1258, 1264 (5th Cir. 1979)), or by the installation of a beeper on the exterior of a car or airplane parked in a location accessible to the public. *United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir. 1981) (en banc), cert. denied, No. 81-112 (Oct. 19, 1981); *United States* v. *Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *United States* v. *Moore*, 562 F.2d 106, 111-112 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976). Because the installation issue was resolved in the government's favor below, we do not address it in this petition.

and "is not an impermissible search." 581 F.2d at 211. The court explained:

> Transmitting the package's location is merely an aid to what can be accomplished by visual surveillance. Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case. On the other hand, wiretaps, breaking and entering, and many other searches and seizures fall on the other side of the line. The issue before us is whether the mere presence of the beeper, it having been attached without violating the Fourth Amendment, sufficiently resembles a wiretap to require the "antecedent justification" that a warrant would provide. We hold that it does not.

Ibid. (footnote omitted).[7] Subsequently, in *United States* v. *Bernard*, *supra*, and *United States* v. *Brock*, *supra*, the Ninth Circuit reaffirmed its holding in *Dubrofsky* and upheld the warrantless monitoring of

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[7] Indeed, the court in *Dubrofsky* concluded that the monitoring of a beeper that transmits not only its location inside a residence but also the fact that the package in which it is installed has been opened, an event signaled by a change in the beeper's tone, is likewise not sufficiently intrusive to require a warrant. 581 F.2d at 212. Accord, *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied, No. 81-5828 (Mar. 1, 1982). While *Dubrofsky* involved a package containing heroin, the Ninth Circuit has recently made clear that this fact was not significant to the court's analysis of the beeper monitoring issue. See *United States* v. *Brock*, *supra*, slip op. 696 n.9; *id.* at 701 (Adams, J., concurring).

a beeper attached to a drum of chemicals located inside a residence.

Similarly, in *United States* v. *Clayborne*, *supra*, the Tenth Circuit held that the warrantless monitoring of a beeper that was transmitting signals from inside commercial premises was permissible under the Fourth Amendment. Like the Ninth Circuit in *Dubrofsky*, the court viewed the beeper "as a substitute for persistent extensive visual effort," and it distinguished the slight intrusion occasioned by use of a beeper from the much greater intrusion involved in the use of a device, as in *Katz* v. *United States*, 389 U.S. 347 (1967), to intercept the contents of telephone conversations. 584 F.2d at 351.

In contrast to the Ninth and Tenth Circuits, the First and Sixth Circuits have concluded that the warrantless use of a beeper to determine the continued presence of chemicals inside a residence violates the Fourth Amendment. In *United States* v. *Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), the court acknowledged that "the limited data transmitted by a beeper [is] far less revealing than the conversation recorded in *Katz*" and "the level of intrusion * * * less severe." 562 F.2d at 113. The court nevertheless concluded that when the defendants took inside their house a box of chemicals which, unbeknownst to them, contained a beeper, "they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government." *Ibid.*[8]

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[8] *Moore* actually involved two different beepers, one used to track the movements of an automobile, the other to monitor the continued presence of a package of chemicals inside the defendants' house. The court reached different results with

Relying on *Moore*, the Sixth Circuit in *United States* v. *Bailey*, 628 F.2d 938, 944 (1980), concluded that "[b]eeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the fourth amendment." Although the agents in *Bailey* obtained a warrant authorizing the use of the beeper, the court held that the warrant was invalid because it contained no provision limiting the duration of the surveillance. *Id.* at 945-946. Accordingly, it suppressed evidence obtained as a result of the beeper surveillance.

In this case, the court of appeals expressly rejected the approach of the Ninth and Tenth Circuits and relied instead on the decisions of the First and Sixth Circuits in *Moore* and *Bailey* (App. A, *infra*, 5a-6a). The clear conflict among the circuits on this important question warrants this Court's review. See *Michael* v. *United States*, cert. denied, No. 81-112 (Oct. 19, 1981) (White, J., dissenting); *Miroyan* v. *United States*, 439 U.S. 1338, 1342-1343 (1978) (Rehnquist, Circuit Justice).

2. The decision below goes even further than the decisions in *Moore* and *Bailey*, which struck down the warrantless use of a beeper over an extended period to ascertain the continued presence of chemicals inside private premises. Here, the majority held that the beeper could not be employed to determine the arrival on respondent's property of a package of chemicals used to manufacture illegal drugs. This

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respect to the two beepers, concluding that a warrant was required to monitor the beeper in the house, while probable cause without a warrant was sufficient to monitor the beeper in the car. As we argue later on, the holding of the majority below appears to be inconsistent with the latter holding in *Moore*. See pages 12-13, *infra*.

decision is inconsistent with the decisions of those courts of appeals that have concluded that the warrantless monitoring of a beeper to follow the public movements of a vehicle does not violate the Fourth Amendment.

Some courts have held that the use of a beeper to trace the movements of a conveyance does not implicate Fourth Amendment concerns at all, because an individual has no legitimate expectation of privacy in his public travels. See, *e.g.*, *United States* v. *Bruneau*, 594 F.2d 1190, 1197 (8th Cir. 1979) (airplane); *United States* v. *Miroyan*, 577 F.2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (airplane); *United States* v. *Hufford*, 539 F.2d 32, 33-35 (9th Cir.), cert. denied, 429 U.S. 1002 (1976) (automobile). See also *United States* v. *Michael*, 645 F.2d 252, 259-260 (5th Cir. 1981) (en banc) (C. Clark, J., concurring), cert. denied, No. 81-112 (Oct. 19, 1981) (automobile). Other courts have held that while the Fourth Amendment applies in such situations, the warrantless use of a beeper may be upheld on the basis of either probable cause, see *United States* v. *Moore*, *supra*, 562 F.2d at 111-113 (automobile), or reasonable suspicion. See *United States* v. *Michael*, *supra*, 645 F.2d at 258 (plurality opinion).

The majority below attempted to avoid the import of these decisions by stating that "[t]his is not a case of a beeper being *attached* to an automobile, so the ultimate issue is not whether there can be an expectation of privacy in the route taken by an auto over public roads" (App. A, *infra*, 4a; emphasis added).[9] However, as the First Circuit stated in *United States* v. *Moore*, *supra*, 562 F.2d at 111 n.2:

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[9] The majority acknowledged that the courts have upheld the warrantless monitoring of beepers placed on automobiles

> For * * * fourth amendment purposes, where the issue is whether there was an invasion of a privacy interest, we think it makes better sense to classify the beepers functionally, i.e. by whether or not they were used to tail a vehicle, or else for some different purpose, rather than by whether the beepers were in a package or affixed to the vehicle's underbody. To the extent the packaged beeper was used to follow the vehicle, we think it presents the same fourth amendment problems as the attached beepers.

See also *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied, No. 81-5828 (Mar. 1, 1982); *United States* v. *Bailey*, *supra*, 628 F.2d at 943 n.8. Thus, even assuming arguendo that the monitoring of a beeper to ascertain the continued presence of a beeper on private premises requires a warrant, that would provide no basis for requiring a warrant here, because the agents simply used the beeper to determine the ultimate destination of co-defendant Petschen's vehicle, in which the drum of chloroform was transported over public roads. The beeper, accordingly, gave forth no information that could not have been obtained readily had it been attached directly to Petschen's vehicle or had the agents decided instead to rely solely upon visual surveillance.

3. The decision of the court of appeals in this case is based upon an erroneous view of the Fourth Amendment. The majority concluded that respondent had a "reasonable, legitimate expectation of privacy" (App. A, *infra*, 7a) in the drum of chloroform because it was located "beneath a wooden barrel in the

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(App. A, *infra*, 4a-5a, citing *United States* v. *Michael*, *supra*, *United States* v. *Moore*, *supra*, and *United States* v. *Hufford*, *supra*).

yard of a remote rustic cabin" that respondent occupied (*id.* at 6a). But the majority reached this conclusion without considering to what extent, if any, the use of the beeper actually intruded upon respondent's privacy interests.

As this Court made clear in *Katz* v. *United States*, *supra*, 389 U.S. at 351, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." More recently, in *Smith* v. *Maryland*, 442 U.S. 735 (1979), the Court reaffirmed that not all events occurring within a home or on an individual's property are protected by the Fourth Amendment simply by virtue of the fact that they happen in a "private area," as the majority below thought (App. A, *infra*, 5a). In *Smith*, the Court held that the use of a pen register to record the numbers dialed on the defendant's telephone did not constitute a "search" within the meaning of the Fourth Amendment. Noting that a pen register acquires an extremely limited amount of information (442 U.S. at 741), the Court concluded that the use of the pen register did not violate Smith's legitimate expectations of privacy because "[w]hen he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company," and he "assumed the risk that the company would reveal to the police the numbers he dialed." *Id.* at 744. The mere fact that Smith had dialed the telephone numbers recorded by the pen register "on his home phone * * * could make no conceivable difference" in the constitutional analysis. *Id.* at 743.

Like the pen register in *Smith*, a beeper bears no significant resemblance to the listening device in *Katz*, for it does not intercept private communications but merely conveys a very limited amount of

information. Moreover, here as in *Smith*, the information acquired by the beeper did not violate anyone's legitimate expectations of privacy. "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). The movements of co-defendant Petschen's automobile until it turned onto respondent's property "were at all times in full view of the public * * *. The electronic beeper was merely a more reliable means of ascertaining where [Petschen] was going as he drove along the public road." *United States* v. *Hufford*, *supra*, 539 F.2d at 34-35. Thus, as the district court concluded (App. B, *infra*, 15a-16a; emphasis in original), respondent "could not *reasonably* have expected to keep private the fact that the can had arrived at his residence." Accordingly, the use of the beeper in the circumstances of this case did not constitute a search within the meaning of the Fourth Amendment. See *United States* v. *Brock*, *supra*, slip op. 694; *United States* v. *Michael*, *supra*, 645 F.2d at 259-260 (C. Clark, J., concurring).

Even if the Fourth Amendment is applicable to the beeper surveillance involved in this case, the majority below erred in imposing a warrant requirement. Because of the strictly limited nature of the information conveyed by a beeper, which is capable only of a very narrow intrusion on any privacy interests, it is entirely reasonable under the Fourth Amendment to permit law enforcement officers to conduct beeper surveillance on the basis of suspicion falling short of probable cause. Cf. *Terry* v. *Ohio*, 392 U.S. 1

(1968). In *United States* v. *Michael*, *supra*, a plurality of the en banc Fifth Circuit concluded that reasonable suspicion sufficed to justify the monitoring of a beeper. In reaching this result, the plurality

> consider[ed] the governmental interest in eliminating illegal drug manufacture to be a persuasive reason to permit this minimally intrusive practice. An "intermediate response" based on something less than probable cause, is a proper investigatory tool to aid DEA agents in discovering and eliminating clandestine laboratory operations. In balancing the public concerns served by the use of the beeper, to discover Michael's drug manufacturing apparatus against the slight infringement of Michael's expectation of privacy, we find the beeper's use to be eminently reasonable.

645 F.2d at 259 (footnotes omitted). Of course, if reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant (which may only be issued on probable cause) is not required under the Fourth Amendment. And even if the Fourth Amendment requires more than reasonable suspicion, the use of a beeper should be permissible based on probable cause, without the need for a warrant. The contrary decision below, requiring a warrant simply because a beeper is brought into a private area, ignores the lack of substantial privacy concerns implicated by beeper surveillance and needlessly subverts the legitimate needs of law enforcement authorities to employ enhancement techniques in apprehending criminals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

ANN T. WALLACE
Attorney

MARCH 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 80-1952, 80-1953

UNITED STATES OF AMERICA, APPELLEE

v.

LEROY CARLTON KNOTTS and
DARRYL PETSCHEN, APPELLANTS

Appeal from the United States District Court
for the District of Minnesota

Submitted: March 12, 1981

Filed: October 30, 1981

Before HEANEY and HENLEY, Circuit Judges, and PECK,* Senior Circuit Judge.

PECK, Senior Circuit Judge.

Leroy Knotts and Darryl Petschen appeal from their convictions of conspiring to manufacture con-

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* The Honorable John W. Peck, United States Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit sitting by designation.

trolled substances. The principal issue on appeal concerns the admissibility of evidence obtained through use of a signal transmitter ("beeper") placed by police agents in a can of chloroform purchased by a co-conspirator of the appellants'. Knotts and Petschen argue that the warrantless use of this beeper violated their Fourth Amendment rights, and that the evidence obtained through tracking the beeper should have been excluded by the district court.

Knotts and Petschen were part of an enterprise engaged in the manufacture of amphetamine or methamphetamine. A third member of this enterprise was Tristan Armstrong, the "chemist" of the group, who was indicted with the appellants but pleaded guilty and testified against them. In June of 1979, Armstrong had drawn the suspicion of Minnesota investigators by his alleged pilferage of drug-precursor chemicals from 3M, his former employer. Further investigation of Armstrong raised suspicion of illicit drug manufacturing, and produced evidence linking Armstrong to appellant Petschen. Armstrong was placed under surveillance and seen taking boxes from the Hawkins Chemical Company in Minneapolis to Petschen's house in that city. Petschen in turn took the boxes to a farmhouse in Scandia, Minnesota, where they were unloaded.

Despite the apparent success of visual surveillance, police agents took the further step of using electronics. On February 28, 1980, Minnesota agents delivered to the Hawkins Chemical Company a can of chloroform in which a beeper had been placed with the company's consent. As expected, Armstrong picked up the can later that day. Police followed Armstrong to Petschen's house, where the can was

transferred to Petschen's car. Petschen was followed to his Scandia farmhouse, where he stopped only briefly before driving on. The agent following Petschen twice lost sight of Petschen's car, once purposely when Petschen, perhaps aware that he was being followed, began driving evasively. Shortly after this evasion the agent lost the beeper signal, and the drum's location was uncertain until the signal was again picked up and its source verified through the use of a helicopter. The drum was stationary at a spot later found to be in the yard of a secluded cabin owned by appellant Knotts.

Four days later, Minnesota and federal agents got and executed warrants to search Petschen's farmhouse and Knotts' cabin. The search of the cabin uncovered a clandestine drug laboratory. Chemicals and equipment seized from this laboratory were admitted into evidence over Knott's and Petschen's motions to suppress.[1]

The Fourth Amendment is currently described as protecting persons' "legitimate expectations of privacy" from government's unreasonable intrusions. *See Rawlings* v. *Kentucky*, —— U.S. ——, 100 S. Ct. 2556, 2561-62 (1980); *United States* v. *Salvucci*, —— U.S. ——, 100 S. Ct. 2547, 2552-53 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 139-49 (1978). Such intrusions are unreasonable if the applicable cause or warrant requirements are not met. *E.g.*, *Katz* v. *United States*, 389 U.S. 347, 356 (1967); *Rawlings*, *supra*, —— U.S. at ——, 100 S. Ct. at 2565 (Blackmun, J. concurring).

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[1] The search of Petschen's residence also uncovered precursor chemicals and incriminating documents. On appeal, Petschen does not question the validity of the warrant to search his house.

The difficulty in applying the test of "legitimate expectations of privacy" in electronic surveillance cases is that consideration of such expectations leads almost ineluctably to the "philosophical question" whether the constitutional protections of privacy must or should diminish with technological innovations in surveillance. *See United States* v. *Bruneau*, 594 F.2d 1190, 1196 (8th Cir.), *cert. denied*, 444 U.S. 947 (1979). The Court in *Bruneau* was reluctant to address this sweeping question. It limited its decision to the narrow question before it, and we will follow this judicious lead.

The narrow preliminary issue in this case is whether the monitoring of a beeper placed in an item of non-contraband personalty can be a search subject to the Fourth Amendment's restrictions.[2] This is not a case of a beeper being attached to an automobile, so the ultimate issue is not whether there can be an expectation of privacy in the route taken by an auto over public roads. *Cf. United States* v. *Michael*, 645 F.2d 252, 257 (5th Cir. 1981) (en banc, 11-3-10 decision) (plurality relied on the diminished expectation of privacy surrounding automobiles), *cert. denied*, 50 U.S.L.W. 3299 (Oct. 20, 1981); *United States* v. *Moore*, 562 F.2d 106, 112-13 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) ("probable cause" sufficient to justify warrantless electronic tracking of car on public roads); *United States* v. *Hufford*, 539

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[2] Another preliminary issue is whether *installation* of the beeper violated constitutional protections. Following *Bruneau*, we hold that the consent of the owner at the time of installation meets the requirements of the Fourth Amendment, even if the consenting owner intends to soon sell the "bugged" property to an unsuspecting buyer. *See* 594 F.2d at 1194. *Caveat emptor.*

F.2d 32, 34-35 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976) (used same rationale as *Michael* plurality).

The Circuits that have considered the constitutional strictures on tracking beepers placed, not on vehicles, but on other personalty, have reached varying results. Numerous courts have seen no legitimate expectation of privacy in the movement of illicit drugs discovered in international mail. *See United States* v. *Bailey*, 628 F.2d 938, 942 (6th Cir. 1980), and cases cited there. The chemical tracked in this case is not contraband. It would be a limitless expansion of police power to allow warrantless tracking of lawful goods wherever an illicit use was suspected. If crime is suspected, cause for electronic surveillance of any private area or activity should be determined by a neutral magistrate, not by interested executive agents. *See Bailey, supra*, 628 F.2d at 944.

The First and Sixth Circuits have held that if an object is placed in a "private area," *Bailey, supra*, 628 F.2d at 944, or "with[drawn] from the public view," *Moore, supra*, 562 F.2d at 113, beeper surveillance of the object's location or movement is an infringement of legitimate privacy interests. As such this surveillance is subject to the warrant or cause requirements of the Fourth Amendment. The Ninth and Tenth Circuits, on the other hand, have formulated what might be called a *de minimis* exception to the Fourth Amendment, holding that since the intrusiveness of beepers is slight, beeper surveillance does not require the antecedent justification of a warrant. *See United States* v. *Clayborne*, 584 F.2d 346, 350-51 (10th Cir. 1978) [a]; *United States* v. *Dubrof-*

[a] *Clayborne* also suggests that the area invaded by the use of the beeper in that case was open to the public, although the only information offered to support that conclusion was that

sky, 581 F.2d 208 (9th Cir. 1978), *followed, United States* v. *Bernard*, 625 F.2d 854, 859-60 (9th Cir. 1980).

The decisions of the First and Sixth Circuits are more persuasive. Expectation of privacy is the touchstone of Fourth Amendment protections, and expectations of privacy do not depend on the artfulness and suavity of the invasive means of government agents. In the present case the beeper's signal led police agents to a drum of chloroform beneath a wooden barrel in the yard of a remote rustic cabin. This cabin was not found by watching or tracking the "public" progress of Petschen in his car. Agents lost both natural and electronic "sight" of Petschen and did not again pick up the signal from the bugged container until the container was stationary and out of public view at the cabin owned by Knotts.

The argument raised by the government, that "use of a beeper to monitor the path of an object contemplates use of a beeper to determine its final resting place" proves too much in this case. As noted above, a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment. It did so in this case, where the beeper's signal was

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the building housing the clandestine laboratory in *Clayborne* had several entrances. *See* 584 F.2d at 350 n.2 and accompanying text.

lost and found again only after the beeper-laden drum was on private property out of public view.

Knotts, as the resident of the property, could certainly have a reasonable, legitimate expectation of privacy in the kind and location of objects out of public view on his land. With Petschen, however, this is not so. Petschen asserts that he had a reasonable expectation of privacy in articles left at Knotts' farm because he was a co-venturer of Knotts' and had a "possessory and proprietary interest in the laboratory equipment, chemicals and in the laboratory which he set up and operated." Although Petschen might have had a subjective expectation of privacy in the equipment of a clandestine drug laboratory on his coconspirator's property, this is not an expectation "that society is prepared to recognize as 'reasonable.'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143 n.12 (quoting *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring)). The evidence obtained from the search of Knotts' cabin was admissible against Petschen, but not against Knotts.

The appellants' second contention, that there was a fatal variance between the indictment and proof in their cases, is not persuasive. The indictment charged conspiracy to manufacture "controlled substances, including but not limited to, [*sic*] methamphetamine. . . ." The evidence at trial tended to show conspiracy to produce amphetamine, not methamphetamine. Amphetamine is also a controlled substance, so there was no variance from the indictment's charge. Even though the proof did vary from the superfluous example of a controlled substance given in the indictment, that variance did not affect "substantial rights" of the appellants'. *See* Fed. R. Crim. Pro. 52(a).

For the reasons set forth above, appellant Petschen's conviction is affirmed; appellant Knotts' is reversed.

HENLEY, Circuit Judge, dissenting in part.

While I concur in the majority's affirmance of Petschen's conviction, I would affirm as well the conviction of Knotts.

First, it is not clear that monitoring a beeper which only broadcasts location is a "search," as opposed to a mere visual aid such as binoculars, search lights, or trained dogs. *See United States* v. *Bruneau*, 594 F.2d 1190, 1196 (8th Cir. 1979); *United States* v. *Dubrofsky*, 581 F.2d 208, 211-12 (9th Cir. 1978). Assuming, however, that monitoring the beeper in this case was a search, and further assuming that Knotts had standing to raise a fourth amendment challenge, the issue becomes whether Knotts had a reasonable and legitimate expectation of privacy in the location of the barrel of chloroform on his property.

As the majority notes, the cases are inconsistent in this area, in terms of both result and analysis. One analysis focuses on the *location* of the item containing the beeper. Under this analysis, items may generally be monitored in public places, *e.g.*, *United States* v. *Moore*, 562 F.2d 106, 112-13 (1st Cir. 1977), *cert. denied sub nom. Bobisink* v. *United States*, 435 U.S. 926 (1978), but monitoring may be prohibited after the items are withdrawn from public view, *e.g.*, *United States* v. *Bailey*, 628 F.2d 938, 944 (6th Cir. 1980). Another analysis focuses on the *nature* of the item containing the beeper. Under this analysis, contraband items may be monitored regardless of location, *e.g.*, *United States* v. *Emery*, 541 F.2d 887

(1st Cir. 1976), whereas most noncontraband items may be monitored under the former analysis only if they are in a public location, *e.g.*, *United States* v. *Moore*, *supra*. *Cf. United States* v. *Perez*, 526 F.2d 859, 863 (5th Cir.), *cert. denied*, 429 U.S. 846 (1976) (beeper placed in television received in exchange for heroin). The rationale underlying the "contraband exception" is that one cannot have a legitimate expectation of privacy in "property which he has no right to possess," *United States* v. *Emery*, 541 F.2d at 889-90, or in property which is a direct part of a negotiated illegal transaction. *United States* v. *Perez*, 526 F.2d at 863.

The facts in this case arguably support Knotts' conviction under either analysis. As the majority observes in note 3, the Tenth Circuit, in *United States* v. *Clayborne*, 584 F.2d 346, 350-51 (10th Cir. 1978), apparently suggested that one does not have a legitimate expectation of privacy in a clandestine laboratory. *See United States* v. *Bruneau*, 594 F.2d at 1195-96 n.11. The facts in this case indicate that the beeper led agents to a clandestine laboratory on Knotts' property.

A more persuasive argument may be made in support of Knotts' conviction, however, pursuant to the second analysis. Under this approach, the issue as stated in *United States* v. *Bailey*, 628 F.2d at 944, is whether the contraband exception should be expanded to include precursor chemicals such as the chloroform in the present case. The majority concludes that such an expansion "would be a limitless expansion of police power [allowing] warrantless tracking of lawful goods wherever an illicit use was suspected." The majority's concern with limitless police power is certainly a valid one, and the distinc-

tion between contraband and noncontraband may be convenient. Nevertheless, such an inflexible rule might prohibit a true determination of the legitimacy of an expectation of privacy in items intended for use in the illegal manufacture of controlled substances.

The rationale and policy considerations underlying the contraband exception can safely be applied to certain noncontraband items. For example, the Fifth Circuit, in *United States* v. *Perez*, *supra*, suggested in dictum that "a person who accepts an item of personal property in exchange for heroin has no reasonable expectation that it is cleansed of any device designed to uncover the tainted transaction or identify the parties." *Id.* at 863. *See United States* v. *Bailey*, 628 F.2d at 944; *United States* v. *Moore*, 562 F.2d at 111. If society would not legitimize an individual's expectation of privacy in a television received in exchange for heroin, it seems that an expectation of privacy in the location of chemicals intended for use in the manufacture of illegal drugs should enjoy no higher status, and that when chemicals are purchased for such intended illegal use, the familiar warning cited by the majority in note 2, *caveat emptor*, might be well-taken.

The majority expresses a concern that expansion of the contraband exception would result in unbridled use of electronic devices to track legally possessed items based on a mere suspicion that such items are destined for illegal use. Such a result is certainly to be avoided, but it is not the necessary consequence of refusing to legitimize an expectation of privacy in precursor chemicals. One aspect apparently not considered by the courts is the effect of the forfeiture provision of the Controlled Substances Act on an individual's possessory interest in precursor chemicals. 21 U.S.C. § 881. Subsection (a)(2) provides for the

forfeiture of "[a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, [or] processing . . . any controlled substance in violation of this subchapter." Although the forfeiture provision does not make possession of precursor chemicals illegal per se, it clearly affects the right to possess such chemicals, and diminishes one's legitimate expectation of privacy with respect to these items.

Furthermore, in the circumstances of this case, the expansion of the contraband exception to include precursor chemicals subject to forfeiture would not allow the government to act on mere suspicion. From the moment Armstrong loaded the beeper-laden drum of chloroform into his automobile, that chloroform became dedicated to use in the very illegal conspiracy of which defendants were convicted and, so dedicated, that chloroform immediately became subject to forfeiture. Although the government agents did not at that time know all of the persons who might be engaged in the illicit operation, they had probable cause to believe that the chloroform was intended for illegal use, as indeed it was.[1] Thus, I conclude that Knotts had no legitimate expectation of privacy in the location of the chloroform that was violated by monitoring the beeper.

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[1] Under 21 U.S.C. § 881(a) and (b) warrantless seizure of the chloroform on probable cause was authorized and where such a seizure is authorized attendant warrantless search of the vehicle containing the forfeitable material is permissible. *United States* v. *Milham*, 590 F.2d 717 (8th Cir. 1979), *citing Cooper* v. *California*, 386 U.S. 58 (1966).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-80 Cr. 49(1)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEROY CARLTON KNOTTS, DEFENDANT

MEMORANDUM ORDER

This matter comes before the court upon the Exception To Order Of Magistrate filed by defendant on June 18, 1980. Based upon all files, records and proceedings herein, the court has made a *de novo* determination as to the issues raised by defendant's Exception.

FACTUAL BACKGROUND

On February 26, 1980, agents of the Minnesota Bureau of Criminal Apprehension placed an electronic transmitter ("beeper") inside a five-gallon can of chloroform with permission of the owner of the can, Hawkins Chemical Company. On February 28, 1980, this can was picked up by Tristan Armstrong, who previously had ordered a can of chloroform from Hawkins Chemical Company. Mr. Armstrong drove the can to 1498 Albany Street, St. Paul. Shortly

thereafter, he and Darryl Petschen transferred the can from his automobile to a 1971 Buick Electra, in which Mr. Petschen departed approximately one and one-half hours later.

Mr. Petschen was followed by surveillance agents of the Minnesota Bureau of Criminal Apprehension to his residence in Scandia, Minnesota, where he stopped for approximately 20 minutes. Mr. Petschen then was observed departing in the 1971 Buick Electra, with the can of chloroform inside, and proceeding in a northerly direction. Approximately two hours later, the agents traced the "beeper" signal which emanated from the can of chloroform to a house in Shell Lake, Wisconsin. Four days later, several of these agents, along with agents from the Drug Enforcement Administration, obtained a warrant to search the house. A search revealed a fully operational laboratory for the manufacture of either amphetamine or metamphetamine. The can of chloroform purchased from Hawkins Chemical Company also was discovered in the house.

Defendant was indicted on April 11, 1980 for allegedly violating 21 U.S.C. §§ 841(a)(1) & 846. On April 17, 1980, defendant entered a plea of not guilty and moved to suppress evidence allegedly seized illegally from his Shell Lake, Wisconsin residence and all the "fruits" thereof. Defendant contends that there was not probable cause to support the issuance of a warrant to search his residence. He argues that crucial information contained in the supporting affidavit must be excluded because it was collected in violation of his fourth amendment rights.

By Order of June 12, 1980, United States Magistrate George G. McPartlin denied defendant's motion to suppress. It is to this Order that defendant has taken exception.

DISCUSSION

The Eighth Circuit has adopted a " 'bifurcated analytical framework' which examines the fourth amendment implications of the installation or attachment of the beeper separately from the fourth amendment implications of monitoring its signals." *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th Cir. 1979). Therefore, the court must separately examine the circumstances of the installation and the circumstances of the monitoring of the "beeper" to determine whether in either instance there was a "search" which violated defendant's fourth amendment rights.

> In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States*, 389 U.S. 347 (1967).
>
> Consistently with *Katz*, [the Supreme] Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry . . . normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy." . . . The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " [*Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations omitted).]

Government agents installed the beeper in the can of chloroform two days before Mr. Armstrong took

possession of it and with the consent of Hawkins Chemical Company, which then owned and possessed the can. This consensual installation of the beeper did not invade anyone's expectation of privacy and thus could not have violated the Fourth Amendment. *See United States* v. *Bruneau, supra*, 594 F.2d at 1194; *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir. 1978); *United States* v. *Abel*, 548 F.2d 591 (5th Cir.), *cert. denied*, 431 U.S. 956 (1977). The installation certainly could not have violated the fourth amendment rights of defendant, as the can of chloroform was ordered and paid for by Mr. Armstrong and Mr. Petschen. It was the Hawkins Chemical Company and they, if anyone, who on February 26, 1980 had a legitimate expectation of privacy in the can of chloroform.

Nor did the use of the "beeper" to determine the ultimate destination of the can of chloroform infringe upon defendant's fourth amendment rights. The relevant inquiry is: "What is one's reasonable, subjective expectation of privacy in the location of a can of chloroform purchased and transported to one's residence by other persons less than two hours previously?" *See United States* v. *Bruneau, supra*, 594 F.2d at 1197. There is no evidence that defendant exhibited a subjective expectation of privacy in the arrival at his house of a can of chloroform which had been transported there on public thoroughfares by other persons.

Moreover, had defendant exhibited a subjective expectation of privacy, such an expectation would not have been one that society is prepared to recognize as "reasonable." The ultimate destination of the can was readily determinable through visual surveillance of Mr. Armstrong and Mr. Petschen. Hence, defendant could not *reasonably* have expected to keep private

the fact that the can had arrived at his residence. *See United States* v. *Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976); *United States* v. *Frazier*, 538 F.2d 1322, 1325-27 (8th Cir. 1976) (concurring opinion), *cert. denied*, 429 U.S. 1078 (1977).[1] *See also Katz* v. *United States*, *supra*, 389 U.S. at 351 ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.")

The employment of a "beeper" to find defendant's clandestine laboratory differs greatly from the use of a "beeper" condemned in *United States* v. *Moore*, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978), upon which defendant relies. In *Moore*, a "beeper" was utilized to monitor the *continued presence* of chemicals in a house. The defendants in *Moore* "had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government." 562 F.2d at 113. Here, in contrast, a "beeper" was employed not to monitor the continued presence of chemicals or defendant's activities within defendant's house, *cf.* Note, 86 Yale L. J. 1461, 1493 (1977), but to ascertain the final destination of chemicals transported by others—*i.e.*, to determine the location of the house itself.

Government agents monitored the signal emanating from the can within defendant's residence for an extremely short period of time. Such monitoring did not invade any reasonable subjective expectation of privacy of defendant and thus was not a "search"

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[1] It also may be argued that defendant lacked any reasonable expectation of privacy in "the location of a clandestine laboratory in which illegal drugs are manufactured." *United States* v. *Bruneau*, *supra*, 594 F.2d at 1196 n.11.

within the meaning of the Fourth Amendment. *See United States* v. *Bruneau, supra,* 594 F. 2d at 1196.

There can be little doubt that the affidavit of Edward M. Bauer, which included information constitutionally collected with the aid of a "beeper," established probable cause for the issuance of a warrant to search defendant's residence. Accordingly, defendant's motion to suppress will be denied.

Upon the foregoing,

IT IS ORDERED That the motion of defendant to suppress evidence be and it hereby is in all things denied.

DATED: July 11, 1980.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 80-1952

UNITED STATES OF AMERICA, APPELLEE

vs.

LEROY CARLTON KNOTTS, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This cause was heard on a designated record from the United States District Court for the District of Minnesota and was argued by counsel.

After consideration it is now ordered and adjudged that the judgment and commitment of the said District Court in this cause be, and the same is hereby, reversed in accordance with the opinion of this Court.

October 30, 1981

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 80-1952

UNITED STATES OF AMERICA, APPELLEE

vs.

LEROY CARLTON KNOTTS, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

The Court, having considered appellant's [sic] petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearings en banc denied. Judges Ross, Stephenson and Henley would grant the petition for rehearing en banc.

December 29, 1981

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Joint Appendix

Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1802

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

LEROY CARLTON KNOTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

MARK W. PETERSON
Marquette Building— Suite 100
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR CERTIORARI FILED MARCH 29, 1982
CERTIORARI GRANTED JUNE 21, 1982

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KNOTTS, LEROY CARLTON
DOCKET ENTRIES

Date	(Document No.)	Proceedings	Excludable Delay
4-11-80	1)	INDICTMENT (Renner-J: Riley) Ordered that bond be cont'd per JEC.	
4-17-80	2)	APPEARANCE BOND executed 3-5-80, $30,000 c/s.	
	3)	MOTION FOR SEVERANCE AND SEPARATE TRIALS	2 4-17-80 E 41 5-27-80
	4)	MOTION TO SUPPRESS	
	5)	MOTION TO DISMISS THE INDICTMENT	
	6)	MOTION TO COMPEL ATTORNEY FOR THE GOVERNMENT TO DISCLOSE EVIDENCE FAVORABLE TO THE DEFENDANT	
	7)	MOTION FOR DISCOVERY AND SUPPRESSION OF CONFESSIONS OR STATEMENTS IN THE NATURE OF CONFESSIONS	
	8)	MOTION FOR DISCLOSURE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS	
	9)	MOTION TO PERMIT INSPECTION OF GRAND JURY PROCEEDINGS	
	10)	MOTION FOR DISCLOSURE AND PRODUCTION OF INFORMANT	
	11)	MOTION FOR DISCOVERY AND INSPECTION	
	12)	MOTION FOR NOTICE OF OTHER OFFENSES	
	13)	MINUTES OF PROCEEDINGS (McPartlin-M:Tape 36A) *ARRAIGNMENT* Reading waived. Not guilty plea entered. Motions filed by 4-24-80; gov't response due 5-1-80; heard 5-8-80, 10:30; trial to be set. Bond cont'd.	

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY
4-23-80	14) ORDER MODIFYING CONDITIONS OF BOND (McPartlin-M: 4-23-80) Deft shall be required to report in person to U.S. Marshal at Mpls. each Friday of each week at 9:00 a.m. during pendency of these proceedings.	
	15) NOTICE TO COUNSEL	
5-28-80	16) MINUTES OF PROCEEDINGS (McPartlin-M: Hoffman) Motion for severance-taken under advisement; to suppress-taken under advisement; to dismiss indictment-taken under advisement; to compel gov't to disclose evidence favorable-gov't complied; for discovery and suppression of confessions-gov't stated there are none; disclosure of intercepted wire communications-gov't stated there are none except for pen registers and beeper; permit inspection of grand jury minutes-gov't will proceed; discovery inspection-gov't complied; notice of other offenses-gov't will provide.	2 5-28-80 G 45 7-11-80
5-29-80	17) ORDER (McPartlin-M: 5-29-80) that bond be amended to allow deft to work and live in Phoenix, Arizona provided deft appears as required.	
	18) NOTICE TO COUNSEL	
6-12-80	19) ORDER (McPartlin-M: 6-12-80) Deft's motion to suppress evidence is denied; Deft's motion for severance and separate trial is denied.	
	20) NOTICE TO COUNSEL	
6-18-80	21) EXCEPTION TO ORDER OF MAGISTRATE	
7-11-80	22) MEMORANDUM ORDER (Alsop-J:7-11-80) motion of deft to suppress evidence is denied.	
	23) NOTICE TO COUNSEL	
7-14-80	24) WAIVER OF SPEEDY TRIAL RIGHTS	

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY
7-18-80	25) PETITION AND ORDER DIRECTING ISSUANCE OF WRIT OF HABEAS CORPUS AD TESTIFICANDUM	
7-21-80	26) MINUTES OF PROCEEDINGS (Alsop-J:Lindberg) *PRETRIAL CONFERENCE* Clerk to call 32 jurors to box. Case ready for trial.	
	27) MINUTES OF PROCEEDINGS (Alsop-J:Lindberg) *JURY TRIAL*— Jurors were impaneled and sworn. Gov't presents opening statements. Defense waives opening statements. Ordered that all witnesses be sequestered. Adjourned to 9:30 a.m. 7-22-80.	
	28) LIST OF JURORS	
7-22-80	29) MINUTES OF PROCEEDINGS (Alsop-J: Lindberg) *FURTHER JURY TRIAL* Gov't witnesses testify. Adjourned to 9:30 a.m. 7-23-80	
	30) STIPULATION	
7-23-80	31) MINUTES OF PROCEEDINGS (Alsop-J: Lindberg) *FURTHER JURY TRIAL* "In chambers" Gov't renews its offer of Ex 28-argued & sustained. Gov't rests. Defense rests. Defense moves for judgment of acquittal—denied. Ordered that gov't submit transcript before grand jury which shall be made part of the record. Defense moves to reopen deft's case—withdrawn and defts rest. "Open court" 11:55 a.m. Gov't and defense argue to court and jury. Gov't argues in rebuttal. Court instructs the jury which retires at 4:15 p.m. to commence deliberations. Jury returned into open court at 5:05 p.m. Court excuses jury until 9:30 a.m. 7-24-80 to resume their deliberations.	

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY
7-24-80	32) MINUTES OF PROCEEDINGS (Alsop-J:Lindberg) *FURTHER JURY TRIAL* Jury resumed deliberations at 9:30 a.m. Jury returned into court at 3:10 p.m. Jury finds defts Knotts and Petschen guilty as charged in the Indictment. Jury discharged with directions to report 8-4-80, 9:00 a.m. Bond cont'd. Referred for PSI.	
	33) VERDICT of Knotts	
	34) GOVERNMENT'S REQUEST FOR INSTRUCTIONS TO THE JURY	
	35) DEFENDANT'S REQUESTED JURY INSTRUCTIONS	
7-28-80	36) WRIT OF HABEAS CORPUS AS [Sic] TESTIFICANDUM for Robert Thomas Hood—executed July 18, 1980 and July 7, 1980	
9-26-80	37) MINUTES OF PROCEEDINGS (Alsop-J:Lindberg) *SENTENCING*—Custody of Attorney General for 5 yrs. Execution of sentence stayed until 10-7-80, 9:30 a.m. Deft to report to U.S. Marshal, Mpls. Execution of sentence further stayed if valid appeal is filed before surrender date.	
	38) JUDGMENT AND COMMITMENT ORDER—delivered 2 cert copies to U.S. Marshal, 2 cert copies to U.S. Probation, 1 cert copy to U.S. Attorney, and 1 copy to U.S. Bureau of Prisons.	
10-6-80	39) APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	
	40) AFFIDAVIT OF LEROY KNOTTS	
	41) ORDER (Devitt-J:10-6-80) Deft is granted leave to proceed in forma pauperis on appeal.	

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY
	42) NOTICE OF APPEAL from Judgment 9-26-80.	
	Mailed cert copy of Notice of Appeal, 2 cert copies of docket entries, and information sheet to USCA. Also mailed 3 cert copies of notice of appeal, docket entries, indictment, orders, judgment and sentence to USCA.	
10-23-80	43) DEFENDANT'S DESIGNATION OF RECORD AND STATEMENT OF ISSUES	
10-29-80	44) GOVERNMENT'S DESIGNATION OF RECORD—statement of agreement	
	Mailed three certified copies of Designated Record to USCA.	
11-3-80	45) TRANSCRIPT OF TRIAL VOL I 7-21-80	
	46) TRANSCRIPT OF TRIAL VOL II 7-22-80	
	47) TRANSCRIPT OF TRIAL VOL III 7-23-80	
	Mailed 3 volumes of transcripts to USCA.	
11-14-80	ELECTRONIC RECORDINGS OF SENTENCING 9-26-80, Box 80-C, Env. 1	
6-1-81	48) ORDER (Boline-M:5-29-81) Deft may travel to Edgemont, So. Dakota from May 30 thru June 4, 1981.	
9-4-81	REPORTERS NOTES OF TRIAL, 7-21-80—7-23-80, Lindberg, Box 81-4.	
1-7-82 re-opened	49) CERTIFIED COPY OF OPINION (MANDATE — HEANEY, HENLEY & PECK) AFFIRMING the conviction of Petschen; and REVERSING the conviction of Knotts.	START 1-7-82

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY
	50) CERTIFIED COPY OF JUDGMENT OF THE COURT OF APPEALS (10-30-81) REVERSING the judgment and commitment of the District Court in accordance with the opinion of this Court.—for deft. Knotts.	
	51) NOTICE TO COUNSEL.	
4-5-82	52) *STIPULATION*—Re: Writ of Certiorari with the U.S. Supreme Court, is *excludable delay* within *18 USC 3161(h)* from 1-7-82 til decision is rendered.	4-5-82

Excerpts of the Preliminary Hearing
March 11, 1980

[2] MR. MORROW: Yes, Your Honor.
THE COURT: Ready to proceed?
MR. FRIEDBERG: Ready, Your Honor.
THE COURT: Call your first witness.
MR. MORROW: We'll call Agent Tim Shanley.

TIMOTHY J. SHANLEY,
called as a witness by the Government, being first duly sworn, testified as follows:
THE COURT: State and spell your name for the record, and give your occupation, please.
THE WITNESS: Timothy J. Shanley, S-h-a-n-l-e-y. I'm employed as an investigator assigned to narcotics for the Minnesota Bureau of Criminal Apprehension.

DIRECT EXAMINATION

By Mr. Morrow:
Q Agent Shanley, have you been the case agent in a case involving Tristan Armstrong and Mr. Knotts as far back as June 14th of last year, 1979?
A Yes, sir.
Q Would you tell the Court what happened on June 14, 1979, specifically (Inaudible) Mr. Armstrong possessing some chemicals and various laboratory material?
A I received information from representatives of the 3M Company in St. Paul that they had an employee by the name of Tristan Armstrong who had been withdrawing or [3] stealing phenylacetone as well as other chemicals, commonly known or commonly used precursors in the manufacture of amphetamine or methamphetamine. After I found that out, I set up an interview with Mr. Armstrong.
Q At that meeting with Mr. Armstrong, did he admit that he was taking this precursor from 3M?
MR. ROSENBAUM: Objection. At this point were any Miranda warnings or any warnings—
THE COURT: It's overruled. He may answer.
A Yes, he did.
By Mr. Morrow:
Q Did you talk to Armstrong about giving consent to search various areas of his laboratory?

A Yes, sir.

Q And did you search areas of his laboratory and find some receipts for various apartments?

A Yes, sir, I did.

Q Tell the Court what happened after you checked out those receipts for these apartments—what you found at these two locations, what the locations are.

A I found receipts as well as other documents for two residences, one being 518 Pine Tree Trail in Stillwater, the other being 1698 Leone Street in St. Paul, Minnesota—rent receipts, utility bills, phone bills and the like.

Q Did you go to Leone Apartments?

[4] A Yes, sir, I did.

Q Did you talk to the owner there?

A I talked to the landlord, yes.

Q What did the landlord tell you about Mr. Armstrong and that apartment?

A He said that in fact he had been renting it out to Mr. Armstrong for a period of time, and the lease had been broken, according to him, that had been signed by Mr. Armstrong.

Q Did the landlord direct you to the basement area?

A Yes, sir, he did.

Q And was that to some materials that Mr. Armstrong had thrown away or had told the landlord that he didn't care for any more?

A Right. There was piles of garbage and the like.

Q Did you take that substance that was thrown away by Mr. Armstrong and have it analyzed by the chemists?

A Yes, sir, I did.

Q What was the substance?

A Some of the powders recovered indicated the presence of—I forget the chemical name—but it was a by-product of amphetamine synthesis.

Q How about the Pine Tree Trail address? Did you check that out as well?

A I checked it out only to see where it was at that [5] time.

Q Okay. Let's move to February 26, 1980. Did you put a beeper device into a five-gallon jug of chloroform?

A Yes, sir.

Q Would you explain the circumstances behind that—how you learned that information, that Mr.

Armstrong was going to pick up some chemicals from a company, and what the company was?

A During the length of this investigation, I had the cooperation from the authorities from the Hawkins Chemical Company. They had been receiving numerous orders over a period of time from Mr. Armstrong. And when I found out what the last order entailed, including the chloroform, we substituted the chloroform which he ordered into a separate can containing a beeper for surveillance purposes.

Q And this was done on February 26th of this year?

A Yes, sir.

Q On February 28th, then, what happened?

A We followed Mr. Armstrong, who, in fact, picked up the chemicals and drove immediately from the Hawkins Chemical plant to 1498 Albany Street in St. Paul, Minnesota. At that location a short while later the chemicals were taken out of Armstrong's vehicle and subsequently given over to Darryl Petschen.

Q Agent Shanley, these chemicals we're talking [6] about—did they include 25 pounds of sodium acetate, 6,000 grams of phenyl acetic acid, and a five-gallon drum of chloroform?

A Yes, sir.

Q Those were the chemicals that were transferred from Armstrong's car to whose?

A To the vehicle of Darryl Petschen.

Q Okay. Tell the Court what happened after that.

A A short while after the chemicals were transferred, we initiated a surveillance of Mr. Petschen and followed him up to his residence in Scandia, Minnesota. There was no transfer of chemicals at that location, and approximately 20 minutes later Mr. Petschen left his farmhouse residence and proceeded into Wisconsin. And a few hours later we saw him in the area of the Shell Lake cabin.

Q Was Mr. Petschen during this time driving a 1971 Buick Electra 225?

A Yes, sir, he was.

Q And the residence that Mr. Petschen drove to in Scandia, Minnesota—do you know whose residence that is?

A The Scandia residence is currently being rented by Darryl Petschen.

Q After Mr. Petschen left the Scandia residence, you did follow him or you didn't follow him?

A We did follow him, yes.

[7] Q Did you follow him to Shell Lake, or did the beeper just—

A We followed not only him, but we followed the beeper. At times we lost communication for a period of time, but we ascertained that he stopped at two hardware stores on the way up. We subsequently received a signal, the transmitter signal, in the vicinity of the Knotts or Price cabin in Shell Lake.

Q Tell the Court about this cabin in Shell Lake. Whose cabin is it?

A I believe it came through the family of Georgia Price, handed down to her. She indicated to me that she had been living there with Mr. Knotts for the last year. Both individuals received mail there.

Q By "both individuals," you mean Mr. Knotts and Ms. Price?

A Yes, sir.

Q And she told you she had lived there with Mr. Knotts for the last year?

A Yes, sir.

Q Did you check the phone tolls for Darryl Petschen's number, which is 433-3653?

A Yes, sir, I did.

Q Tell the Court what you found as far as phone calls going to the Knotts cabin.

[8] A For the last several months, phone tolls from the residence of Darryl Petschen indicating he's been calling the Knotts farmhouse on several occasions.

Q Were you along on March 3, 1980 when a search warrant was executed, Agent Shanley?

A Yes, sir, I was.

Q Would you tell the Court what happened at that search warrant, what was found? First of all, who was with you, and when was it executed, approximately?

A The search warrant on the Shell Lake cabin was executed in the early morning hours, 5:30, 6:00 a.m. Accompanying we were other agents from the BCA as well as DEA agents, U.S. marshals, and representatives from the Burnett County sheriff's office. We recovered what appeared to be—

MR. THOMSON: Excuse me, Your Honor. At this time, without waiving any Fourth Amendment objections, for the purposes of this hearing we'll allow the testimony. But I

want the record to reflect that we aren't waiving any Fourth Amendment objections to the search.

THE COURT: The record may so show.

By Mr. Morrow:

Q Go ahead. You were telling who the agents were. Were there some chemists with you as well?

A Yes, sir, not only from our lab, but as well as [9] from the Chicago lab.

Q Tell the Court what you found then. This was the early morning hours of March 3, 1980 at the Shell Lake residence of Knotts and Price?

A Yes, sir.

Q Tell the Court what you found.

A Among other things, we recovered what appeared to be a fully functional operating clandestine drug laboratory in the cabin, as well as several chemicals with the name "Hawkins Chemical Company" on it.

Q Were these, in fact, the same chemicals that had been ordered by Tristan Armstrong and transported from Armstrong to Petschen?

A Yes, sir.

Q Go ahead.

A We also recovered several bindles of white powder, which preliminarily tested to be methamphetamine.

Q Did you find any papers or formula in the cabin?

A We found a piece of paper with what appeared to be a chemical equation type formula written upon it.

Q Did the chemists that were along with you, Agent Shanley, look at this laboratory or this equipment and determine what it was used for and what its capabilities were?

A Yes, sir.

[10] Q And what did they tell you?

A The chemist told me that it was a fully-functional operating drug laboratory.

Q Capable of producing what?

A Capable of producing either amphetamine or methamphetamine.

Q Did the chemists look at these papers or formulas that you found in the cabin and determine what they were for?

A Yes, sir.

Q What were they for?

A They said the purpose of the formula was the particular method of operation or synthesis that the individuals running the laboratory were probably using.

MR. MORROW: That's all I have at this time, Your Honor.

CROSS-EXAMINATION

By Mr. Friedberg:

Q Agent Shanley, when the chloroform that included the beeper was ordered, what other chemicals were ordered at the same time? Or what was in that shipment?

A Twenty-five pounds of sodium acetate and 6,000 grams of phenyl acetic acid.

Q Now, based on what you know about the manufacture of amphetamines and methamphetamines, are those three [11] chemicals alone sufficient to manufacture amphetamine or methamphetamine?

A I don't think those chemicals alone are, no, sir.

Q Those three different items, then, were taken into the Petschen car ultimately, is that correct?

A Yes, sir, they were.

Q And that was the same day that you executed the search warrant on the so-called Knotts cabin, right?

A Yes, sir.

Q And those chemicals you saw in the trunk of the Petschen car, is that correct?

A I believe they were in the rear back seat, rear seat of the vehicle.

Q Did you see any other chemicals added to those three that day in the Petschen car?

A Not that day. There was a partial order—he had picked up part of that order the preceding week.

Q Well, in your own mind at that time, or did you observe—outside of those three chemicals that you know headed towards Shell Lake, although you didn't know where they were going at the time, and the fact that the beeper in the chloroform was picked up later, did you have any information indicating to you that the other chemicals necessary for the production of amphetamine or methamphetamine were at the cabin in Shell Lake?

Excerpts of the Trial Transcript
July 21, 22, 1980

* * * * *

[46] PAUL NORGREN

A Primarily investigators duties which consist of a wide variety of things. In industry it isn't a big cop and robber deal as you would imagine for police or TV, it is humdrum activities, making sure supply employees are protected and the company secrets, and small crimes are not committed against the company.

Q Now directing your attention to June of 1979 did you become aware at that time of some misuse of 3M chemicals by an employee?

A Yes.

Q And how did this come about?

A It was reported to the security department that an employee of the Central Research Lab was withdrawing phenylacetone from the laboratory storeroom.

Q And who was this employee?

A This was Tristan Armstrong.

Q And do you know what Mr. Tristan Armstrong's official duties were at 3M?

A He was officially designated, or was a technologist, a technician, that is an assistant to a degreed chemist and they carry out experiments and duties at the instruction of the chemist.

Q And are you aware if Mr. Armstrong, in the course of his regular duties at 3M, had any reason to withdraw phenylacetone from these storage rooms?

[47] A Not for his work as a technician at 3M.

Q Now what did you do after you became aware of the withdrawals of phenylacetone?

A It was determined that Tristan had withdrawn one particular group of phenylacetone and he was talked to at that time and Tristan admitted that he had illegally removed the phenylacetone from 3M.

Q What action did 3M take at that time?

A 3M took the disciplinary action where his employment was terminated, no restitution or prosecution was advocated by 3M and it was agreed that Tristan would talk to the State Crime Bureau agents.

Q And did agents of the State Crime Bureau come and interview him?

A Yes.

Q Who was that agent, if you recall?

A Tim Shanley was the first one that was there.

Q Thank you, Mr. Norgren, I have no further questions.

THE COURT: Mr. Friedberg?

CROSS EXAMINATION

BY MR. FRIEDBERG:

Q Who made the agreement with Mr. Armstrong that he would speak to Mr. Shanley?

A It was agreed following Tristan's admission of his part in removing the phenylacetone and on the final disposition

* * * * *

[50] TIMOTHY SHANLEY

Q Can you describe that for us, please?

A I have gone through the basic police science course required of all Minnesota police officers, as well as specialized training provided by the Federal Drug Enforcement Administration.

Q Now are you the case agent assigned to the matter that has been entitled United States versus Armstrong, Petschen and Knotts?

A Yes, ma'am.

Q Can you describe for us briefly the responsibilities of the case agent?

A A case agent initiates the cases and handles it through to the conclusion, is in charge of collating or gathering all relevant materials and documents in the presentation of the case.

He is also in charge of securing all evidence, making sure that the chain of custody is correct, and testifying in court at its conclusion.

Q Now directing your attention to June 20 of 1979, last summer, did you have occasion to go to the 3M complex in St. Paul, Minnesota?

A Yes, ma'am, I did.

Q And could you tell us what the purpose of your visit there was?

A The purpose at that time was to serve a federal subpoena [51] for the 3M Company for the personal effects and

work-related items that Tristan Armstrong had at his work station at the 3M facility.

Q Had those items from Tristan Armstrong's work station been confiscated by 3M?

A Yes, ma'am.

Q And did you go through those items at that time?

A Yes, I did.

Q And can you describe briefly to the jury what those items consisted of in a general nature?

A Generally they were information concerning chemistry, documents, several jars containing chemicals and other personal effects.

Q Now showing you what has been marked for identification as Government Exhibit No.1, are you familiar with that document?

A Yes, ma'am, I am.

Q How are you familiar with it?

A I seized this pursuant to the federal subpoena.

Q And do you recognize that as being at the 3M work station?

A Yes, ma'am.

Q We would offer Government Exhibit 1.

(Government Exhibit 1 offered in evidence.)

MR. FRIEDBERG: No objection for the

* * * * *

[57] MR. MAUZY: Same objection, Your Honor.

THE COURT: Objection overruled, and 3 is received.

(Government Exhibit 3 received in evidence.)

BY MS. MONTGOMERY:

Q All right. Agent Shanley, what is Government Exhibit No. 3?

A Exhibit No. 3 is one purchaser's receipt of a cashier's check remitted by Tristan Armstrong payable to the Ace Glass Company in the amount of $1822.23 as well as one registered receipt for insurance purposes also to the Ace Glass Company from the Tandem Chemical Company located in St. Paul.

Q Now after your June 30 search of Armstrong's possessions at 3M, what did you do then with regard to this case?

A I decided at that point that surveillance should be initiated and conducted with respect to Mr. Armstrong's activities.

Q And directing your attention to the 24th of June, 1979, did you conduct surveillance on that date?

A Yes, ma'am, I did.

Q And where did your surveillance begin on that date?

A It began at 1698 Leone Street in St. Paul, Minnesota.

Q And how did you happen to proceed to the Leone Street address?

[58] A I had determined that that may have been one—or that location might have been involved, or a lab could have potentially have been set up at that location.

Q Now showing you what has been marked for identification as Government Exhibit No. 4, which appears to be a photograph, are you familiar with that photograph?

A Yes, ma'am, I am.

Q And is that a fair and accurate depiction of the residence at Leone Avenue that you have described?

A Yes, it is.

MS. MONTGOMERY: We would offer Government Exhibit No. 4.

(Government Exhibit 4 offered in evidence.)

MR. FRIEDBERG: Objection on the grounds of relevancy for the defendant Knotts, Your Honor.

MR. MAUZY: Same objection.

THE COURT: Why don't you come up to the bench and we will talk about that relevancy just one moment.

(The following proceedings had at the bench out of hearing of the jury.)

THE COURT: What, Ms. Montgomery, is the testimony going to show as to the two other defendants?

MS. MONTGOMERY: I suspect Agent Shanley will testify—he is talking about June 24, 1979, he saw

* * * * *

[60] court in presence of the jury.)

THE COURT: The objection to 4 is overruled and 4 is received.

(Government Exhibit 4 received in evidence.)

BY MS. MONTGOMERY:

Q Showing you what has been received as Government Exhibit 4, is that the residence you surveilled on June 24, 1979?

A Yes, ma'am, it is.

Q And can you describe for us what you mean by surveillance?

A Surveillance generally means physically watching, either an individual or a location at a specific time.

Q Did you watch the Leone residence on June 24?

A Yes, ma'am, I did.

Q And at approximately what time of day?

A Approximately 1:00 o'clock or 2:00 o'clock in the afternoon.

Q And can you tell me what you observed on the 24th of June?

A On the 24th of June I observed Darryl Petschen, Mary Dougherty and a Daniel Meyers, as well as one other individual moving various items from the residence into a rental truck and included in those items was a fan, rubber hosing, plastic tubing, various related glassware, as well as [61] other furniture and related items.

Q Now you mentioned Darryl Petschen, you observed him on the 24th?

A Yes, ma'am, I did.

Q Do you see the individual you stated as Darryl Petschen present in the courtroom today?

A Yes, I do.

Q Could you identify where he is sitting and what he is wearing, please?

A He is sitting at the defense table with the plaid shirt on at the end of the table, brown hair and a goatee.

MS. MONTGOMERY: May the record reflect that Agent Stanley has identified defendant Petschen?

THE COURT: Give me the names, Darryl Petschen, Dougherty and—

THE WITNESS: Daniel Meyer, M-e-y-e-r.

BY MS. MONTGOMERY:

Q Now, Agent Stanley, how long did these moving activities, for how long a period did they take place?

A That went on for approximately an hour.

Q Now showing you what has been marked for identification as Government Exhibit No. 5, are you familiar with that document?

A Yes, ma'am.

Q And how are you familiar with it?

* * * * *

[63] or two weeks after the surveillance on the 24th, what did you do on that date?

A On July 9?

Q Yes.
A I also conducted surveillance.
Q And did you go to the vacated premises of Leone Avenue on that date?
A Yes, I did.
Q And that is the residence pictured in Government Exhibit No. 4; is that correct?
A Yes, it is.
Q And did you examine the residence on that date?
A Yes, I did.
Q And how did you gain entry?
A I received permission from the landlord of 1698 Leone, Mr. Daniel Boudis.
Q Who lived there on July 9?
A At the time nobody lived there, it was a vacated premises.
Q And did you have an opportunity to observe the vacated premises at the Leone Street address?
A Yes, I did.
Q Could you describe for us the condition of the house which you observed on that date?
A At that time there were several piles of garbage, there was no furniture left in the building, it appeared to be merely [64] an unoccupied residence with garbage to be disposed of.
Q Where was the garbage that was to be disposed of? Where was that located?
A Some of the garbage was piled up outside in the driveway and other garbage was piled in the basement just outside the garage door.
Q Did you examine the basement of the residence?
A Yes, I did.
Q And what did you observe that was significant to you with respect to investigating activities which had previously taken place at the Leone Street address?
A I noted searching through the garbage that there was again tubing, hosing, used glass that had been broken as well as powders which were sitting on a table.
Q Now showing you what has been marked as Government Exhibit No. 6, which appears to be a photograph, are you familiar with that photograph?
A Yes, ma'am, I am.
Q Did you take that photograph?
A Yes, I did.

Q And on what date?
A That would have been on July 9, 1979.
Q And where did you take it?
A It took this in the basement of 1698 Leone.
MS. MONTGOMERY: We would offer at this time Government Exhibit No. 6.
[65] (Government Exhibit 6 offered in evidence.)
MR. FRIEDBERG: Objection, relevancy, Your Honor.
MR. MAUZY: Same objection, relevancy, Your Honor, also under 403, waste of time, confusion.
THE COURT: The objection is overruled and 6 is received.
(Government Exhibit 6 received in evidence.)
BY MS. MONTGOMERY:
Q Agent Shanley, what is the scene depicted in Government Exhibit No. 6?
A The picture reflects one glack table. The photographs represent the top of that table and in the lower righthand corner there are several white specks which were powders.
Q And was this the table which had been abandoned in the basement of the Leone Street address?
A Yes, ma'am.
Q And from that tabletop, as well as other areas, did you attempt to collect the traces of white powder?
A Yes, I did.
Q Now showing you what has been marked as Government Exhibit No. 7, are you familiar with this exhibit?
A Yes, I am.
Q And how are you familiar with it?
[66] A I have got my initials and date and my identification marking as an exhibit.
Q When did you first come in contact with that exhibit?
A That also would have been on July 9, 1979, in the basement of 1698 Leone.
Q And that appears to be some small plastic boxes containing traces of powder, I believe, is that correct?
A Yes, there are six separate boxes, each containing an amount of powder.
MS. MONTGOMERY: We would offer what has been marked for identification as Government Exhibit No. 7.
(Government Exhibit 7 offered in evidence.)
MS. MONTGOMERY: We would offer it, of course, subject to further tying up by a chemist who will testify at a later time.

THE COURT: I was going to ask you if it had been analyzed.

MS. MONTGOMERY: It has been, and there will be testimony later.

MR. MAUZY: Objection, relevance and under 403 a waste of time, and confusion.

THE COURT: Mr. Friedberg?

MR. FRIEDBERG: Objection on the grounds of relevance.

THE COURT: I am satisfied that the foundation

* * * * *

[73] mailing address of Tandem Chemical at 2150 Wilson, Suite 359 in St. Paul, Minnesota, the apartment complex where Tristan Armstrong resided.

Q Are those labels in the same condition as they were with the exception of identifying markings you have put on them when you retrieved them from the garbage?

A Yes, ma'am, they are.

Q That is the way they were cut?

A That is the way I found them, yes.

Q Now directing your attention to December 3 of 1979, did you conduct another surveillance on that date?

A Yes, I did.

Q And approximately what time of day did this surveillance begin?

A That would have been approximately 11:30 a.m.

Q And where was your initial surveillance position?

A At the Hawkins Chemical Company located at 3100 East Hennepin Avenue in Minneapolis.

Q What did you observe at the Hawkins Chemical Company?

A Tristan Armstrong was observed placing I believe two cardboard boxes which he had picked up from the Hawkins Chemical Company into his vehicle.

Q What happened then?

A Another surveillance officer as well as myself followed Mr. Armstrong over to the residence of Darryl Petschen [74] located at 1498 Albany in St. Paul.

Q Now showing you what has been marked for identification as Government Exhibit No. 9 which appears to be two photographs, are you familiar with these photographs?

A Yes, ma'am, I am.

Q And what is depicted in those photographs?

A One photo is the front of 1498 Albany and the second photo reflects the rear entrance and parking area.

Q And do those photos fairly and accurately represent what the residence looks like?

A Yes, ma'am.

MS. MONTGOMERY: We would offer Government Exhibit No. 9.

(Government Exhibit No. 9 offered in evidence.)

MR. MAUZY: No objection.

MR. FRIEDBERG: I have a relevancy objection, may I approach the bench?

THE COURT: You may.

(The following proceedings had at the bench out of hearing of the jury.)

MR. FRIEDBERG: These were pictures of Petschen's house. Now in relation to the residence the photographs were admitted concerning, Ms. Montgomery said she she could tie them to Knotts by virtue of some pictures

* * * * *

[81] DARLENE FERNHOLZ

A This is a copy of the check received for the order, this is a copy of the billing on the order, and then the copy of the bill of lading for proof of delivery.

Q I think you are going to have to talk even louder so everyone can hear.

THE COURT: Are you chewing gum?

THE WITNESS: Yes.

THE COURT: Let's get rid of that.

MS. MONTGOMERY: We offer Government Exhibit No. 11.

(Government Exhibit 11 offered in evidence.)

MR. MAUZY: Objection, relevance, Your Honor.

MR. FRIEDBERG: Same objection.

THE COURT: May I see Exhibit 11, please?

The objection is overruled and 11 is received.

(Government Exhibit 11 received in evidence.)

BY MS. MONTGOMERY:

Q Now, Mrs. Fernholz, directing your attention to what has been received in evidence as Government Exhibit No. 11, does that indicate the placement of an order with Hawkins Chemical Company?

A Yes, it does.

[82] Q And does that record indicate who placed the order?

A Only by the check.

Q And the check would indicate who placed the order?

A Yes.

Q And who does it indicate placed the order?

A Mr. Armstrong.

Q And does it indicate to you the approximate date the order was placed?

A October 1st.

Q Of what year?

A '79.

Q And what was the order for?

A Two cases of formic acid, a case of phosphoric acid, four cases of acetic anhydride it is supposed to read, one bottle of sodium hydroxide.

Q Does that indicate the approximate date at which the order was picked up?

A No, it doesn't. They were a special order item and had to be ordered from the manufacturer and the order is not placed until we receive the check.

Q And do the documents reflect when the delivery was made?

A The first delivery was made around the 3rd of December, 1979. The second one doesn't have the exact date on which it was picked up and then the complete part of the order was picked up around December 28 of '79.

[83] Q And could you tell us which specific items were picked up on December 3?

A One case of phosphoric acid, four cases of acetic anhydride, one bottle of sodium hydroxide.

Q Thank you. Now showing you what has been marked for identification as Government Exhibit No. 12, are these some further records that you have brought from your company?

A Yes, they are.

Q And the questions I asked you with respect to Government Exhibit No. 11, concerning you being the custodian of the records and how the records are kept, would those be true also of the documents contained in what has been marked for identification as Government Exhibit No. 12?

A Yes, they are.

MS. MONTGOMERY: We would offer Government Exhibit No. 12.

(Government Exhibit 12 offered in evidence.)

MR. FRIEDBERG: Relevancy objection for the defendant Knotts, Your Honor.

MR. MAUZY: Same objection.

THE COURT: Same ruling, the objection is overruled and they are received. Whoops, wait a minute, objection overruled and 12 is received.

[84] (Government Exhibit 12 received in evidence.)

BY MS. MONTGOMERY:

Q Now directing your attention to Government Exhibit No. 12, can you tell me what these documents are, briefly?

A The top is a copy of—let's see, the top two copies are a copy of the bill of lading for proof of delivery and the third copy is a copy of the cash sale with a copy of the check and the fourth copy is the original order placed by Mr. Armstrong.

Q And does that document reflect the date the order was placed by Mr. Armstrong?

A December 20, '79.

Q Does it indicate another order as well?

A Pardon?

Q Does it indicate the placement of an additional order as well?

A This is a separate order from the other one, is that what you mean?

Q Correct.

A Uh-huh.

Q And what does it indicate was ordered on that date?

A Twelve by five hundred grams phenylacetic acid, one 25-pound sodium acetate, 1642 grams of acetic anhydride, one 5-gallon can of chloroform, and one 28-pound can of ether reagent.

[85] Q The date it indicates the order was placed was what?

A December 20 and then Mr. Armstrong came in December 31st and paid for it.

Q So it was placed on the—excuse me—I have forgotten, the 20th or the 21st?

A The 20th.

Q And paid for on the 31st, is that correct?

A Yes, ma'am.

Q And does it reflect when those chemicals were picked up?

A A partial order was delivered February 11 of 1980 and the completion was February 28 of 1980.

Q And which chemicals were picked up on February 11, please?

A The acetic anhydride and the ether reagent.

Q And with respect to the 28th, which chemicals were picked up on that date?

A Phenylacetic acid, sodium acetate, and chloroform.

MS. MONTGOMERY: Thank you, I have no further questions.

THE COURT: Mr. Friedberg?

CROSS EXAMINATION

BY MR. FRIEDBERG:

Q Mrs. Fernholz, you are essentially an industrial chemical company, are you not?

* * * * *

[89] MICHAEL CAMPION

date?

A Initially it was Mr. Armstrong.

Q And where did you begin your surveillance on February 11?

A At Hawkins Chemical Company, I believe it is 3100 Hennepin Avenue in Minneapolis.

Q And what did you observe there?

A Mr. Armstrong arrived, I believe it was about 10:55 in the morning. We observed him park in the lot next to Hawkins Chemical, he went inside about 11:15 or so, and I believe one of the employees at Hawkins Chemical started bringing some boxes out and putting them in the back of the van which Mr. Armstrong arrived in.

Q What did you do then?

A Once they loaded some boxes up I believe there was a metal container, we followed, myself along with some other agents, followed Mr. Armstrong from the Hawkins address over to the Petschen residence at 1498 Albany in St. Paul.

Q Is that the residence depicted on what has been received in evidence as Government Exhibit No. 9?

A That is correct.

Q And what did you observe at that location?

A Mr. Armstrong parked in front, went to the back door, I believe he may have also gone to the front door,

knocked for a few minutes and there appeared to be no one at home, at

* * * * *

[100] STEPHEN HAGENEH

A Well, my position for surveillance was the Hawkins Chemical Company at 3100 East Hennepin in Minneapolis.

Q Now what did you and Agent Shanley do when you got to the Hawkins Chemical Company?

A Initially I went into the Hawkins Chemical Company and delivered a gray 5-gallon container or bucket to those people.

Q Now directing your attention to what has been marked for identification as Government Exhibit No. 16, are you familiar with that bucket?

A Yes, I am.

Q And can you tell us what is unique or how you are familiar with that bucket?

A Well, some of the unique things, the most unique thing about the bucket is that it contains a beeper-homing transmitter device concealed in the bottom portion of it and the label that is on that container is one that we made up at the State Crime Bureau to place on that specific container.

Q This label says chloroform?

A That is correct.

Q Now this barrel is actually—actually belongs to the Drug Enforcement Administration, is that correct?

A That is my understanding.

Q And you took it to Hawkins Chemical Company that morning for what purpose?

[101] A An individual named Tristan Armstrong was supposed to pick up five gallons of chloroform from the Hawkins Chemical Company. We replaced that container, the original container, with the gray beeper container.

Q Did you then take actual chloroform and put it into that container?

A Yes, there is chloroform in that bucket.

Q What did you do after leaving the bucket at Hawkins Chemical Company?

A I then assumed a surveillance position of the parking lot and the side door of the Hawkins Chemical Company.

Q And what did you observe there?

A Sometime after 10:00 o'clock in the morning I saw a blue Chevrolet van driven by Tristan Armstrong arrive at the Hawkins Chemical Company.

Q To back up for just a second, the replacement of the original chloroform container with this chloroform container was done with the consent of the Hawkins Chemical Company people?

A That is correct.

Q They were aware of what you were doing?

A Yes.

Q And I think I interrupted you when you were explaining what you observed at the Hawkins Chemical Company. Can you proceed on from that point?

[102] A Mr. Armstrong arrived and entered the Hawkins Chemical Company and sometime later, approximately 20 minutes after his arrival, I watched Tristan Armstrong load several cardboard boxes and the 5-gallon bucket into the blue van.

Q What happened then?

A Mr. Armstrong then left the Hawkins Chemical Company and drove to 1498 Albany Street in St. Paul, which is a residence occupied by the Petschen family.

Q What happened then?

A Mr. Armstrong, probably an hour after his arrival, I saw Tristan Armstrong and an individual known to me as Darryl Petschen remove the cardboard containers from Mr. Armstrong's vehicle and the 5-gallon bucket from Mr. Armstrong's vehicle and they placed these into a tan '71 Buick Electra, I believe it was.

MS. MONTGOMERY: Does counsel again stipulate to the identification of Darryl Petschen?

MR. MAUZY: Yes.

BY MS. MONTGOMERY:

Q Then what happened?

A Tristan Armstrong then left the address 1498 Albany Street and at approximately 1:30 a mobile surveillance of Darryl Petschen in the tan '71 Buick was initiated.

We followed Mr. Petschen from 1498 Albany in St. Paul to a farmhouse in Scandia, Minnesota, which was [103] occupied by Mr. Petschen, where we had seen Mr. Petschen in the past.

Q Did the beeper device implanted in the barrel aid you in your surveillance?

A Yes, it did.

Q Can you explain how that works and how you went about monitoring it?

A We had one unit specifically built to monitor the signal from that transmitter and several other people had just regular scanner radios which would receive the beeping signal from the transmitter in the bucket.

Q Now there is a device in here that emits a beep at periodic intervals, is that correct?

A Yes.

Q Is it an audible beep that you could hear?

A No, not without a radio receiver.

Q So it beeps on a frequency you can pick up with a receiver, is that correct?

A Yes, that is correct.

Q Now what did you observe at Scandia, Minnesota?

A Darryl Petschen drove into the driveway of the farmhouse and remained there for 15 or 20 minutes at the most and then again drove out and headed east on Washington County Road 4.

Q And what happened then?

[104] A I followed Mr. Petschen's vehicle to Marine on the St. Croix, which is at the junction of Washington County Road 4 and State Highway 95. I lost visual contact with Mr. Petschen at that time in Marine on the St. Croix and for a period of time after that I could still hear the beeper signal from the transmitter and then I lost total contact with Mr. Petschen for approximately a half an hour, I believe it was.

Q When did you pick up surveillance again?

A Well, about a half hour later I was near Taylors Falls, Minnesota, and I began to receive a beeping signal from the transmitter again. I continued through Taylors Falls to St. Croix Falls, Wisconsin, and I observed Mr. Petschen's vehicle parked near I believe it was a Fleetway Hardward Store on the Wisconsin side of the river.

Q Then what happened?

A Within five minutes after again locating Mr. Petschen's vehicle I saw Mr. Petschen leave the hardware store, reenter his vehicle, and then he headed east on U.S. Highway 8 into Wisconsin.

Q Now during this period of time did Mr. Petschen seem to detect your surveillance in any manner?

A He didn't appear to. He continued to drive 55 miles per hour, a nice steady pace, and I stayed quite a ways back and I don't believe he observed me.

[105] Q And what happened?

A Well, when we arrived at Turtle Lake, Wisconsin, Mr. Petschen turned north on Wisconsin Highway No. 63 going toward Cumberland, Wisconsin. He drove maybe two or three miles north and then began making evasive type maneuvers. He made an U-turn and came back in my direction and then, within five minutes, he made another U-turn and came back toward me again and shortly after that I terminated the visual part of the surveillance.

Q What did you do then?

A I met with Agent Shanley and Agent Olby(ph) near Cumberland, Wisconsin, and they continued the surveillance from that point.

Q When did you pick up again?

A At around 4:00, I believe, before 5:00 o'clock on the 28th. We again located the stationary signal from the beeper device near Shell Lake, Wisconsin at a farm belonging to Leroy Knotts.

MR. FRIEDBERG: Objection, foundation.

THE COURT: The objection is sustained and the answer is stricken and the jury should disregard the ownership of the farm at this point.

BY MS. MONTGOMERY:

Q Agent Hageneh, showing you what has been marked as Government Exhibit No. 15, maybe we can move it up here, are you familiar with this diagram?

[106] A Yes, I am.

Q And did you assist in the preparation of it?

A Yes.

Q Now using the diagram—

THE COURT: First we had better get it into evidence.

MS. MONTGOMERY: I will move into evidence Government No. 15.

(Government Exhibit 15 offered in evidence.)

MR. FRIEDBERG: No objection.

MR. MAUZY: No objection.

THE COURT: 15 is received.

(Government Exhibit 15 received in evidence.)

BY MS. MONTGOMERY:

Q Using what has been received in evidence as Government Exhibit No. 15, can you orient us to the diagram and the surveillance activity?

A Okay. This being Minneapolis-St. Paul, the surveillance of Tristan Armstrong began at the Hawkins Chemical Company and I followed him from Hawkins Chemical to 1498 Albany in St. Paul where he met with Darryl Petschen. I then followed, after the transfer of the boxes and the bucket, I followed Mr. Petschen generally up Highway 61 through Hugo into [107] rural Scandia. This would be Washington County Road 4 here and then from there, from the farmhouse in Scandia, north on Highway 95 to Taylors Falls, Wisconsin, which would be right here. From Taylors Falls, Minnesota, and St. Croix Falls, Wisconsin, east on Highway 8 and then north on Highway 63 through Cumberland, and when we again located Mr. Petschen's vehicle or at least the beeping signal from the bucket, they were at a cabin somewhat near Shell Lake, Wisconsin.

Q Now approximately what time of day did you get to that cabin near Shell Lake, Wisconsin?

A Prior to 5:00 o'clock in the afternoon.

Q And what did you observe then?

A Well, we basically established a stationary surveillance position around that cabin and there wasn't a great deal of activity. About 8:00 o'clock in the evening, after dark, myself and Agent Winberg on foot walked approximately half a mile into the woods on the driveway leading to the farm in an attempt to observe any vehicles or activity at that location.

Q Now the next day, Febraury 29, did you continue to maintain some surveillance at the cabin?

A That is correct.

Q And what did you observe on that date?

A On the 29th, around 4:30 in the afternoon, I believe, [108] I saw the tan 1971 Buick Electra driven by Darryl Petschen leave the driveway of the farm that we had under surveillance and as that vehicle came east it passed directly in front of my surveillance vehicle. I observed Darryl Petschen driving the vehicle and he had a male passenger with him at that time that I later identified as Leroy Knotts.

Q Do you see the passenger you saw with Darryl Petschen present in the courtroom today?

A Yes, it is the gentleman with the kind of grayish beard and mustache and ponytail and cross on his neck.

MS. MONTGOMERY: May the record reflect Agent Hageneh identified the defendant Knotts?

BY MS. MONTGOMERY:

Q What did you next observe?

A I terminated my surveillance activity shortly thereafter for fear I would have been seen too many times in the vicinity and actually no significant activities did occur while I was present.

MS. MONTGOMERY: Thank you, no further questions.

THE COURT: Mr. Friedberg?

CROSS EXAMINATION

BY MR. FRIEDBERG:

Q Agent Hageneh, sometime around 3:30 you lost contact with the Petschen vehicle, that is surveillance lost contact [109] with it?

A That is correct.

Q And the beeper was later picked up by helicopter?

A If I have the time frame properly, I lost contact with Petschen once near Marine on the St. Croix, not very far from the Scandia farmhouse.

Q All right. The next time?

A Again, near Cumberland, Wisconsin, and I believe it was around 3:30.

Q So you didn't know where he was from 3:30 until about 4:30, right?

A That is correct.

Q And at 4:30 that signal was picked up by the helicopter, is that correct?

A The signal was intermittent up to that time but we verified the location at around 4:30.

Q And you surveilled the cabin from when to when?

A We had more people coming in at about 4:30, several of us set up around the perimeter of the roads leading to and from tha cabin, and we maintained that surveillance until the early morning hours of the 29th of February and then we reinitiated that surveillance at around—in the early afternoon hours of the 29th.

Q So there was about twelve hours when there was no surveillance at the cabin?

A Pretty close to that, I would think.

[110] Q Now was there really no surveillance of it or was there still some left, just not you?

A To my knowledge we didn't have any people there. Everyone had gone, had left with plans to return later that day on the 29th.

Q Did you observe who if anybody was in the cabin when Mr. Petschen arrived?

A No.

Q So it was at approximately 4:00 o'clock the next day that you saw Mr. Petschen with Mr. Knotts?

A Yeah, around 4:00 o'clock—4:30 I saw them.

Q When did you start that surveillance up again, at about 3:00 o'clock in the afternoon?

A I think it would have been before then. I would say right around noon.

Q Noon?

A Noon or 1:00 o'clock.

Q So it may be that Mr. Knotts arrived at that cabin sometime between the end of your surveillance at 2:00 o'clock or 3:00 o'clock in the morning and noon the next day and then left again with Mr. Petschen?

A I have no way of knowing that.

Q That is possible, correct?

A It could be possible, certainly.

Q In fact, you don't know if there was anybody inside that

* * * * *

[112] Q Agent Hageneh, approximately how many officers were involved in surveillance?

A At any one time there could have been as many as ten or twelve officers in the area.

Q And were videotapes made by other officers other than yourself of the activities you have described?

A Yes, there were several videotapes taken.

Q And do you know who was primarily responsible for the videotapes on that day?

A I believe Agent or Supervisor John Gundersen was.

MS. MONTGOMERY: Thank you, I have nothing further.

THE COURT: You are excused then. Is that all?

MR. FRIEDBERG: That is all.

MS. MONTGOMERY: May we approach the bench?

THE COURT: You may.

(The following proceedings had at the bench out of hearing of the jury.)

THE COURT: Who is that fellow in the courtroom? Where has he gone now, he just walked out with the blue sport coat taking notes?

Somebody thought he was a reporter.

I don't know.

That answers that question. Okay, yes, ma'am?

* * * * *

[132] JOHN BOULGER

police department?

A I have been—I initially started on the Morals Squad and I went to a patrol function, tactical squad, special operations and into narcotics. I have been in narcotics for nine years.

Q And what training have you had in the narcotics area?

A I have attended the two-week DEA school, a three-day BCA seminar, another two week DEA school. By DEA I mean Drug Enforcement Administration, then a ten-week police officers academy for narcotics in Washington, D.C.; and two conspiracy seminars.

Q Where do you maintain your office?

A In the federal building in Minneapolis with the Drug Enforcement Administration.

Q And you are assigned to the task force I believe you said earlier?

A That is correct.

Q Could you explain briefly what is meant by the Task Force?

A The Task Force consists of Drug Enforcement Administration agents, Minneapolis police officers, it is a combination of federal and state law enforcement agencies and by compiling the two they get the input from state, federal and local agencies.

[133] Q Now in that capacity do you work with agents of Minnesota Bureau of Criminal Apprehension?

A That is correct.

Q And were you assigned to the DEA or federal representative to work with Agent Shanley of the Minnesota Bureau of Criminal Apprehension?

A Yes.

Q Now directing your attention to March 3 of 1980, where were you on that date?

A We were near a cabin near Shell Lake, Wisconsin.

Q And what was your purpose of being there on March 3, 1980?

A To search the cabin and the surrounding areas of the cabin.

Q Had you or other officers with you obtained a search warrant for that residence?

A Yes, Special Agent David Haight applied for and received a search warrant for the cabin and the general area near the cabin.

Q And what time of the day did you execute your search warrant or did you go there to search?

A We went into the cabin about 5:30 a.m.

Q Now, Agent Boulger, can you describe the setting of the cabin in Shell Lake?

A The cabin is in a—off a county road, a dirt road, and [134] you have to follow another dirt road to get to the cabin approximately a half a mile and the cabin is situated with no other residence or cabins nearby. It is adjacent to the Clam River. It is a remote area.

Q Now directing your attention to what has been marked for identification as Government Exhibits 21, 22, 23, 24, 25 and 26, are you familiar with the photographs in each of those envelopes?

A Yes, I am.

Q And are they fair and accurate depictions of the outside and the inside area around the Shell Lake cabin?

A That is correct, these photos were taken on March 3, 1980.

MS. MONTGOMERY: We would offer Government Exhibit Nos. 21 through 26.

(Government Exhibits 21 through 26 offered in evidence.)

MR. FRIEDBERG: No objection to 22 through 27. I have an objection on the grounds of relevancy that I would like to make at the bench in relation to No. 21.

THE COURT: No objection to 22 through 26, did I hear you right?

MR. FRIEDBERG: 26.

THE COURT: Do you have any objection?

MR. MAUZY: Objection, relevance, to all the [135] exhibits, Your Honor.

(The following proceedings had at the bench out of hearing of the jury.)

MR. FRIEDBERG: Your Honor, just one, No. 21, first of all, I don't believe it to be important because it doesn't show anything but a road and some trees.

THE COURT: What does that say?

MR. FRIEDBERG: It says, "No trespassing, target area," that is what I am objecting to. It is certainly an indication that there might be a weapon here and I don't think that has any probative value whatsoever. I don't think that there is anything proved by this photograph that needs to be proved and the prejudicial effect of that is speculative but present, I think.

THE COURT: Let me see the rest of them.

MR. MAUZY: "Target", does that mean a target defendant?

THE COURT: This is an outbuilding of some kind?

MS. MONTGOMERY: And laboratory chemicals seized out of the building.

THE COURT: Who is that?

MR. FRIEDBERG: Shanley.

THE COURT: We can cut him out of that.

Okay, now your objection is as to 21, is that [136] it.

MR. FRIEDBERG: That is right.

THE COURT: And your position is relevance?

MR. MAUZY: Yes, Your Honor, and under Rule 403 I feel that they are irrelevant to my client. It might have relevance to the codefendant.

THE COURT: Isn't their testimony the car was followed over to this place with Petschen driving?

MS. MONTGOMERY: Yes, Your Honor.

THE COURT: I am going to overrule all the objections including the one as to 21. It seems to me that that indicates a desire on the part of somebody to keep people out of the area and maintain its privacy. With reference to whether there was any target shooting or not it seems to me that the import of the sign is number one, to show its remoteness, and number two, to show they are trying to keep people out of there. I think that is relevant and I would overrule the objection.

MR. FRIEDBERG: I would ask in light of the Court's ruling, I would like to question the prosecutor on the record as to whether she has any intention of indicating by ar-

gument or otherwise that there was some preparation to shoot people.

MS. MONTGOMERY: No, the government will not argue that, there will not be anything to that effect.

[137] THE COURT: I will instruct him not to.

MS. MONTGOMERY: I might indicate when the videotape comes on it shows other signs being posted, one of which is signed, and it says, "We are a law unto ourselves," signed Tuffy and Georgia.

It does show up on the videotape. I have taken the videotape, there wasn't any guns found and all the signs of guns have been clipped out of the tape.

THE COURT: Who is it signed by?

MS. MONTGOMERY: Tuffy and Georgia.

THE COURT: Tuffy is the defendant or the alias for—

MS. MONTGOMERY: Knotts.

MR. FRIEDBERG: Tuffy is my client, it is a nickname as opposed to an alias, and we object to that sign. That sign can't have any possible relevance.

THE COURT: What does it say?

MS. MONTGOMERY: I will have to look at it again, but I think it says no trespassing—I can get the exact wording from the agent, but—

THE COURT: That is visible on the tape when you see it?

MS. MONTGOMERY: Yes, it is.

MR. FRIEDBERG: It is, "We are a law unto ourselves," signed Tuffy and Georgia.

[138] MS. MONTGOMERY: It is handwritten on the bottom of a no trespassing sign.

THE COURT: You are objecting to that too?

MR. FRIEDBERG: I believe its prejudicial effect outweighs its probative value.

MR. MAUZY: Same objection.

THE COURT: That is overruled. It says no trespassing?

MS. MONTGOMERY: Can I talk to the agent?

THE COURT: Yes.

MS. MONTGOMERY: I can't recall the precise language but it says no trespassing, something to that effect, something about violators will be prosecuted, and then written on the bottom of the sign it says enter at your own risk, we are a law unto ourselves, Tuffy and Georgia, something to that effect.

We think it is probative of a clandestine operation and the need to keep strangers out.

THE COURT: Keep strangers away—Georgia is Georgia Price?

MR. FRIEDBERG: Yes, also known as Georgia Knotts, right.

MS. MONTGOMERY: Right.

THE COURT: Is she married to Mr. Knotts?

MS. MONTGOMERY: I believe they might have been [139] married since the search.

We have heard that, I don't know if that is true or not.

MR. FRIEDBERG: I don't know.

THE COURT: Okay.

MS. MONTGOMERY: I think it would be fair to say they are paramours at a minimum.

THE COURT: What is he writing out over there?

MS. MONTGOMERY: I am trying to have him write down the precise wording of the sign so I can bring it back. Do you want me to check now?

THE COURT: If you can, if he has got it.

Is the evidence going to show who the owner of that property was?

MR. FRIEDBERG: I don't know. I think it is Milt.

THE COURT: I will let it in.

(The following proceedings had in open court in the presence of the jury.)

THE COURT: Okay, do you want to go ahead? 21 through 26, being photographs, are received.

(Government Exhibits 21 through 26 received in evidence.)

BY MS. MONTGOMERY:

[140] Agent Boulger, directing your attention to Government Exhibit No. 21, can you describe the scene depicted in that photographs?

A This is the road leading into the cabin.

Q The driveway?

A Yeah. There is only one, there is a road that leads off the county road and that leads only to the cabin. That is the only road.

Q Approximately how long was that road before you got to the cabin?

A About half a mile.

Q Is there a sign that appears in the picture?

A There is a sign that says, "No trespassing."

Q And what else does it say?

A It says target area.

MS. MONTGOMERY: May these photos be passed?

THE COURT: Yes, you go ahead with the questioning but circulate 21 through 26 as you go ahead.

BY MS. MONTGOMERY:

Q Showing you 22, what is the scene depicted in tha. photograph?

A No. 22 shows the front of the cabin as you approach it off the road, as the road ends at the cabin.

Q And Government Exhibit 23?

A This is another view of the cabin but it is from the left

* * * * *

[143] Q Now you went in and searched the cabin area itself, is that correct?

A Yes.

Q And I notice depicted on the cabin you have three basic rooms, one labeled bedroom, kitchen, living room and laboratory?

A That is correct.

Q How does one make entry into the laboratory area from either the bedroom, kitchen area or the living room area?

A Once you are in the cabin it is at this portion which is the top portion of the laboratory, there was paneling placed there, you had to remove the paneling, there was no doorway, it was all shut over, so we had to move just regular-sized pieces of paneling, slide it to one side to get into this room. You couldn't see in the room because all the windows were boarded up from the outside.

You can see that in some of the photographs from the lefthand side.

Q So the laboratory area could be shut off so that you wouldn't be aware it was there if you were a guest in the cabin, is that correct?

A That is correct.

Q Now showing you Government Exhibit No. 26, where was that photograph taken?

A This was taken inside the laboratory room. It is this

* * * * *

[160] to that X designating what has been marked for identification as Government Exhibit No. 29?

BY MS. MONTGOMERY:

Q Showing you what has been marked for identification as Government Exhibit No. 30, are you familiar with that?

A Yes, I am.

Q And when did you first come in contact with that exhibit?

A Again in the kitchen-bedroom area of the cabin at Shell Lake, Wisconsin.

Q And the date you came in contact with it?

A On March 3, 1980.

THE COURT: We would offer Government Exhibit No. 30.

(Government Exhibit 30 offered in evidence.)

MR. MAUZY: Could we approach the bench?

THE COURT: You may.

(The following proceedings had at the bench out of hearing of the jury.)

MR. MAUZY: If I may inquire of the assistant U.S. attorney as to the alleged authorship of that apparent formula, the exhibit being offered, I would like to know if she knows who authored the exhibit or if she is going to produce testimony concerning its authorship.

* * * * *

[162] (Government Exhibit 30 received in evidence.)

MR. MAUZY: No, Exhibit 30 is—is in handwritten form rather than printed form.

THE COURT: It is printed, but handprinted is what it is with chemical formulas.

MS. MONTGOMERY: In light of the fact that it discusses both methamphetamine and emphetamine, are you willing to reconsider your ruling on Government 28?

THE COURT: Not at this time. I will have to hear from the chemist before I get involved in that.

(The following proceedings had in open court in presence of the jury.)

THE COURT: The objection is overruled and 30 is received.

BY MS. MONTGOMERY:

Q Agent Boulger, what is Government Exhibit No. 30?

A It is two sheets of paper, apparently with three separate groupings, and under each heading there is a notation about that particular item that the heading is about.

Q Okay. Can you tell us what the three headings are?

A The first heading is amphetamine, the second one is ephedrine and the third one is methamphetamine.

Q Would it be fair to say that those are formulas for the creation of those items?

A Yes.

[163] Q Are amphetamine and methamphetamine controlled drug substances?

A Yes, they are.

Q You are not a chemist, is that right, Agent Boulger?

A No, I am not.

MS. MONTGOMERY: Your Honor, may I distribute 30?

THE COURT: You may circulate 30 among the jury.

BY MS. MONTGOMERY:

Q Would you indicate on the diagram where you found this exhibit?

A This was found in the bedroom area, again a dresser that is against this wall which is the wall directly adjacent to the front door at the bottom of the diagram.

MS. MONTGOMERY: Now, Your Honor, if I may have the Court's permission I would like to have Agent Boulger come to the back of the courtroom area to testify about the next exhibit rather than move them.

THE COURT: He may as long as he keeps his voice up good and loud so we can hear him, especially Mr. Lindberg.

BY MS. MONTGOMERY:

Q Agent Boulger, directing your attention to the large item

* * * * *

[173] pumps, one large condenser filled with white powder; one large condenser coated with residue.

32 gallons of acetic anhydride, one pound of sodium hydroxide, four bottles of phosphoric acid that all have that lot number 811852.

Eight bottles containing 4000 grams of phenylacetic acid. Four bottles containing 2000 grams of phenylacetic acid. One brown box containing 40 pounds of formic acid. One box containing 25 pounds of sodium acetate. One brown box containing two 4000 milliliter vacuum glasses and two Hirsch funnels. One heating mantel stand. Two boxes of miscellaneous glassware. One 25-pound box of sodium acetate. Two heating mantels with stands. One brown wooden foot locker containing two immersible pumps and assorted hosing and tubing, two jacks and three reostats which are

variable transformers. Several green-ringed clamps. Two power-stat variable speed transformers. One solid state speed controller box.

One metal Cole-Parmer stirring device, miscellaneous tubing, clamps and hoses; and the reaction flask, that large one I pointed out as Government Exhibit No. 31.

BY MS. MONTGOMERY:

Q And moving on to the area outside the log cabin?

A Outside the log cabin, one 8-pint drum of 2-propanol and the 5-gallon drum containing chloroform and the beaker found outside the cabin.

[174] Q This is what was found?

A That is correct.

Q That is Government 16?

A That is correct.

Q I would like you to place on the diagram 16, where that was found.

A It was, as you look at the diagram, in the lower lefthand corner just outside the cabin.

Q And in what condition was that found?

A It was underneath a wooden barrel and found in the same condition as it is now.

Q Okay. Moving onto the items inside the cabin other than the laboratory room which relate in your opinion—relate to the laboratory room—

THE COURT: Now have in mind that objection has been sustained as to some of those items; I don't want him to read those if they are on that list.

THE WITNESS: You mean in the trailer or in the cabin?

BY MS. MONTGOMERY:

Q In the cabin and omitting what you have marked on your list as Exhibits 11 and 12, those are DEA numbers—

A There was a 3M hard hat found in the living room hanging by the doorway and then the items I have described earlier, the briefcase that had the photographs and the dresser that had the [175] formula and the other items found in the living room.

Q And including Government Exhibit No. 30, the formula?

A That is correct.

Q Now moving onto the trailer area which is over to the righthand side or the lefthand side, excuse me, in the lefthand corner of the diagram?

A In the trailer there were five more footlockers containing glassware, two 8-pint containers of ether that were partially full; two 50-pound jars of acetic anhydride; two boxes containing 500 gram empty bottles of phenylacetic acid; .2 kilograms of sodium methoxide; one bottle of muriatic acid; three gallon jugs of formamide, which were full and two empty ones; two gallons of acetone, one full, one empty; three empty 500-gram bottles of phenylacetic acid; there was a Pepsi container with several bottles; one 5-gallon drum of chloroform, approximately 21 pints of formic acid; two plastic bottles of formamide; and two pint bottles of acetone.

Q And now moving on to the items designated on the diagram as the truck?

A In the truck there was one 750-watt heating mantle similar to the ones I described earlier; various assorted tubing and hoses, and several large Buchner funnels.

Q And moving onto the items found in the red shed area on the righthand side of the diagram?

A In the red shed was the large metal plate that I

* * * * *

[196] TRISTAN ARMSTRONG

about what his role would be in the agreement?

A Well, basically Mr. Petschen gave the orders and I followed them.

Q Did you discuss with him what you would do with the end product that would be produced?

A Not really.

He took control of it.

Q Were you to have anything to do with the distribution of the product?

A No.

Q What did he tell you in that regard?

A "Leave it to me."

Q And where did you get the equipment that you used at the St. Clair laboratory?

A It was taken out piecemeal from 3M, discarded—there is a lot of unused equipment at 3M and a lot of glassware that is not being used.

Q And the chemicals you used in connection with the experimentation at St. Clair were obtained from where?

A From 3M.

Q Now while you were experimenting at the St. Clair Avenue residence how often would you go there?

A Oh, it must have been two or three times a week, working in the evenings.

Q And that would be after you worked at 3M?

* * * * *

[210] or not again as often as I did the St. Clair where the initial research was done.

Q Now I believe we established this morning that you moved to the Leone Street residence about March 1st of 1979?

A Yes.

Q And did you remain there through the spring and into the summer months?

A I believe we did, yes.

Q And how would you determine how much you were going to work or when things were going to be done?

A That all came from a directive from Mr. Petschen.

Q What did he tell you in that regard?

A That that was basically his business and his operation.

Q Now were there times in which you had to work harder than others? Were there deadlines?

A It appeared to me there were deadlines, yes, coming from possibly—well, yes.

Q Now directing your attention to June 20 of 1979, did you have occasion to speak to Agent Shanley on that date?

A Yes, I did.

Q And what precipitated or caused you have this conversation with Agent Shanley?

A My having taken the phenylacetone from 3M and thus the week that preceded my meeting with Tim Shanley, I went before a disciplinary board and was terminated with cause at 3M.

* * * * *

[262] ANNE RUMMEL

A It consists simply of taking the suspected powder and extracting it with a chemical solvent, in this case methanol, and subjecting it into the gas chromatograph and running it through the gas chromatograph and mass spectra and the results are printed out on a chart.

Q I am not sure I understand. What were the results of your test performed upon what has been marked for identification as Government Exhibit No. 7?

A The test indicate that the powder contained alpha, alpha dimethyldiphenethylamine.

Q What is that?

A That is a substance that is a byproduct of the amphetamine synthesis.

MS. MONTGOMERY: Your Honor, at this time we would reoffer Government Exhibit 7.

MR. FRIEDBERG: Your Honor, may I ask a question?

THE COURT: You may.

MR. FRIEDBERG: When you say it is a byproduct of the amphetamine synthesis, does that mean that when you manufacture amphetamine this stuff is what is left over?

THE WITNESS: It can be. It can be a contaminant, it can be what is left over, it can be mixed in with the amphetamine and in some cases it may not be produced at all.

MR. FRIEDBERG: But it comes about because of

* * * * *

[272] RICHARD GELSOMINO

it yourself I believe you have previously testified?

A Yes.

Q What controlled substances can be manufactured by running a Leuckart synthesis?

A Amphetamine can be made by the Leuckart synthesis, methamphetamine can be made by the Leuckart synthesis, and a compound called MDA or methylenedioxyamphetamine can be made by the Leukart synthesis.

Q Now did you have an opportunity to examine all of the evidence maintained at that residence?

A Yes.

Q And what would you estimate from your experience the total value of the various items of the glassware and equipment that was found, what was the total value of the glassware and equipment found at the Shell Lake cabin?

A It would be somewhere in excess of $10,000.

Q And did you examine and determine the amounts of each of the ingredient chemicals present at the cabin?

A Yes.

Q And how much amphetamines, using this Leuckart synthesis process that you have described, could be pro-

duced from the chemicals maintained at the Shell Lake residence?

A Approximately 14 pounds.

Q And what purity is that?

A That would be 100 percent purity.

[273] Q Now from your analysis of other amphetamine samples, what is the common street strength of the amphetamine you have analyzed?

A It varies anywhere from 10 to 40 percent, but I would think around 20-25 percent would be common.

Q Now taking the figure of 14 pounds of pure amphetamine based you say that would be produced at this Shell Lab lab and cut to street strength, how many pounds of amphetamine of street strength quality could be produced?

A Approximately fifty-some pounds, in the neighborhood of 50 pounds.

Q Showing you Government Exhibit 30 which appears to be two formulas, you have examined this, these formulas in my office prior to coming to Court today, is that correct?

A That is correct.

Q And how would you characterize those formulas? What are they?

A They are formulas for the production of amphetamine by two different methods.

Q And is there a receipe there for the manufacture of a substance other than amphetamine?

MR. FRIEDBERG: Object as to anything else as irrelevant.

THE COURT: Objection overruled, you may answer.

[274] THE WITNESS: Yes, there is.

BY MS. MONTGOMERY:

Q What is that drug?

A A recipe for methamphetamine.

Q Amphetamine and methamphetamine, would it be fair to say, are chemicals that are closely related?

MR. FRIEDBERG: Objection, leading.

THE COURT: It is leading, objection sustained.

BY MS. MONTGOMERY:

Q Are amphetamine and methamphetamine related to each other?

A Methamphetamine is the methyl analog of amphetamine.

Q Are they in the same so-called family?

A Yes.

Q Did you receive in the mail various washings taken by chemist Rummel of the Minnesota Bureau of Criminal Apprehension?

A Yes, I did.

Q Were you able to analyze those?

A Yes.

Q What process did you use to analyze those?

A Gas chromatography, mass spectroscopy, and infrared spectroscopy.

Q What are the results of your analysis?

A That the large reaction flask contained a chemical called

* * * * *

Supreme Court of the United States

No. 81-1802

UNITED STATES, PETITIONER,

v.

LEROY CARLTON KNOTTS

ORDER ALLOWING CERTIORARI. Filed June 21, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Opposition

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NO. 81-1802

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA, PETITIONER

V.

LEROY CARLTON KNOTTS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRIEDBERG & PETERSON
Mark W. Peterson
Suite 100 Marquette Building
400 Marquette Building
Minneapolis, Minnesota 55401
612/339-8626

Attorneys for Respondent
Leroy Carlton Knotts

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA, PETITIONER

V.

LEROY CARLTON KNOTTS

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The respondent, by and through his attorneys, FRIEDBERG & PETERSON, and pursuant to Rule 46.1, United States Supreme Court Rules, hereby moves the Court for permission to proceed in forma pauperis.

Respondent sought permission to proceed in forma pauperis before the United States Court of Appeals for the Eighth Circuit, and such request was granted.

Respectfully submitted,

FRIEDBERG & PETERSON

BY: _____

Mark W. Peterson
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
612/339-8626

Attorneys for Leroy Carlton Knotts

DATED: 5/27/82

REASONS FOR DENYING THE PETITION

The government's primary contention in support of their request that this Court grant review of this case is the conflict between the decision of the Court of Appeals for the Eighth Circuit in this case with decisions reached in other circuits. (Government's Petition for a Writ of Certiorari, at 7. Hereinafter: Petition). The government is quite correct in asserting that there is such a conflict which exists; however, the conflict is not as "direct" as the government suggests.

The decision is primarily at odds with those in the Ninth Circuit, starting with United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978), which held that installation of a beeper in a package of heroin violated no Fourth Amendment right where the beeper was utilized only to assist visual surveillance. In United States v. Bernard, 625 F.2d 854, 861 (9th Cir. 1980), the court held that installation of a beeper in a can containing chemicals, and use of the beeper to determine the can's location, did not violate the defendant's reasonable expectation of privacy, citing Dubrofsky as contolling and making no mention of the contraband/noncontraband distinction. Finally, United States v. Brock, 667 F.2d 1311, 1322 (9th Cir. 1982), involving the same case as Bernard, followed precedent in holding that a beeper used to monitor the presence of chemicals within a cabin for two days did not violate the Fourth Amendment. The majority opinion noted, however, that unlimited, warrantless use of a beeper would not be approved. 667 F.2d at 1322. In addition, the two concurring opinions recognized the questionable validity of a pervasive rule which does not consider distinction between types of property and places where it is located before applying the rule that no warrant is required. 667 F.2d at 1324 (Adams, J., concurring, 1326 (Fletcher, J., concurring). There clearly is the possibility, therefore, that the rule in the Ninth Circuit may change when the next beeper case reaches that court.

United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978) also asserted by the government to be in direct opposition to the rule of the instant case, is clearly distinguishable. The Tenth Circuit carefully drew the distinction between the warrantless use of a beeper in a defendant's home and in a laboratory which is not a residence.

> The clandestine laboratory here was a commercial establishment which was susceptible not only to outside viewing, but also to ingress and egress of the public. Strict privacy as in a home was not to be properly expected here. 584 F.2d at 350.

The language utilized in arriving at this result makes it clear that a contrary ruling would have been announced had the monitoring of the beeper taken place in a house; the Court's statement that the warrantless monitoring of the home there (which resulted in the discovery of no evidence) was "clearly illegal," 584 F.2d at 251 n.3, leaves no doubt that when the appropriate facts are presented to the Tenth Circuit, the result will be the same as that in the instant case.

Both in the government's framing of the issue (Petition at i), throughout the argument in support of the request for certiorari (e.g. Petition at 12) and when referring to decisions that are contended to be applicable here (Petition at 15), the government attempts to establish as the question here involved the warrantless use of a beeper in assisting surveillance of a motor vehicle, containing a drum of chemicals, as it proceeds along public highways. However, as the facts developed in the trial court make clear (Tr. 105, 108), the beeper was not utilized solely to assist surveillance, but in fact was used to determine the final resting place of the chemical drum within which it has been placed - - a barrel located adjacent to the rural cabin where respondent lived. As stated by the Eighth Circuit:

> In the present case the beeper's signal led police agents to a drum of choloroform beneath a wooden barrel in the yard of a remote rustic cabin. This cabin was not found by watching or tracking the "public" progress of Petchen in his car. Agents lost both natural and electronic "sight" of Petchen and did not again pick up the

> signal from the bugged container until the container was stationary and out of public view at the cabin owned by Knotts. United States v. Knotts, 662 F.2d 515, 518 (8th Cir. 1981).

The respondent concedes here, as he did before the Court of Appeals, that the mere use of a beeper to assist surveillance of a motor vehicle is not illegal by reason of the failure to obtain a warrant. See, e.g. United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976), cert. den. 429 U.S. 1046. That question, however, is not presented to this Court in this case; the Court of Appeals recognized that it was not presented below either. 662 F.2d at 517. Despite respondent's concession below and the clear statement of the issue by the Eighth Circuit, the government persists in claiming that "the agents simply used the beeper to determine the ultimate destination of co-defendant Petchen's vehicle, in which the drum of choloroform was transported over public roads." (Petition at 13). The point which the government misses, however, is that once the chemical drum arrived at respondent's residence and was thereby withdrawn from public view, respondent had a legitimate expectation of privacy in the chemical drum, and therefore warrantless determination of the location of this non-contraband property was unlawful. United States v. Moore, 562 F.2d 106, 113 (1st Cir. 1977), cert. den. 435 U.S. 926, on remand, 469 F.Supp. 953 (D. Mass. 1977); United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980). The government simply refuses to recognize the expectation of privacy that the respondent enjoyed at his home, asserting that the agents obtained no further information from the beeper than they would had it been attached to Petchen's vehicle or had they continued to rely upon visual surveillance. (Petition at 13). Neither of these speculative possibilities, unfortunately, are established by the record.

Finally, the government claims that the opinion of the Court of Appeals is based upon an "erroneous view" of the Fourth Amendment. (Petition at 13). What the government means, of course, is that they disagree with the Eighth Circuit's conclusion that respondent,

> as the resident of the property, could certainly have a legitimate expectation of privacy in the kind and location of objects out of public view on his land. 662 F.2d at 518.

This conclusion is the only rational one which flows from Katz v. United States, 389 U.S. 347, 351 (1967)- - what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" - - and Smith v. Maryland, 442 U.S. 735, 740 (1979) - - when a person claims the protection of the Fourth Amendment, he must have a "justifiable", "reasonable" or "legitimate" expectation of privacy. Given the location of the drum containing the beeper, at respondent's residence, it is clear beyond doubt that he intended its location to be unknown and unexposed to the public. Secondly, it is quite reasonable for a citizen to assume that the police will not be able, through the use of an electronic device, to monitor the presence of an item which is lawfully possessed for a continuous and indefinite period of time. It simply will not do for the government to claim, again, that there is no expectation of privacy in the public travels of an automobile (Petition at 15). The beeper here was not merely utilized to assist visual surveillance; it was used to determine the location of a lawfully possessed item on respondent's property.

Finally, the government contends that even if the Fourth Amendment applies, a warrant should not be required and something less than probable cause should be allowed to permit the use of beeper surveillance. (Petition at 15). The general rule, of course, is that a search without a warrant is unlawful unless the exigencies of the situation make that course imperative. Robbins v. California, __ U.S. __, 101 S.Ct. 2841, 2844 (1981). In support of their contention, the government cites United States v. Michael, 645 F.2d 252, 259 (5th Cir. 1981) (en banc), cert. den. __ U.S. __, 102 S.Ct. 489; not surprisingly, for Michael is apparently the only reported beeper case which permits beeper surveillance upon such a minimal showing of suspected criminal activity. Neither that decision nor the government here explains why the general warrant requirement is not applicable, nor why probable cause should not be

required to monitor the location of property which is not contraband. The government's assertion, in any event, is not a reason for which this Court should grant certiorari.

CONCLUSION

Although there is divergent authority on the issues involved with utilization of beepers to conduct surveillance, the conflicting authority has had no serious consequences, in that the issue does not arise with any great degree of frequency. The decision of the Court of Appeals in this case is well founded on precedent in both this and other courts and the government has failed to show adequate justification for the granting of certiorari in this case. We therefore respectfully submit that their Petition should be denied.

Respectfully submitted,

FRIEDBERG & PETERSON

BY: _____
Mark W. Peterson
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
612/339-8626

Attorneys for Leroy Carlton Knotts

DATED: 5/27/82

Petitioner's Reply Brief

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No. 81-1802

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEROY CARLTON KNOTTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Respondent concedes (Br. in Opp. 1) that the decision below conflicts with the decisions of the Ninth Circuit in *United States* v. *Dubrofsky*, 581 F. 2d 208 (1978), *United States* v. *Bernard*, 625 F. 2d 854 (1980), and *United States* v. *Brock*, 667 F. 2d 1311 (1982). In each of these cases, the Ninth Circuit upheld the warrantless monitoring of a beeper attached to a package after it had been taken inside a residence. The court below expressly rejected the Ninth Circuit's approach and held that the Fourth Amendment was violated by the warrantless monitoring of the beeper after the drum containing the beeper had been placed out of public view on respondent's property (Pet. App. 5a-7a). It is difficult to imagine a more direct conflict: if this case had arisen in the Ninth Circuit, respondent's Fourth Amendment claim clearly would have been rejected. The constitutional validity of beeper surveillance, an important tool in discovering remote clandestine laboratories at which

large quantities of controlled substances are illegally manufactured, should not turn on the particular situs of the illicit operation.

Respondent suggests, however, on the basis of the concurring opinions in *United States* v. *Brock, supra*, that there is a "possibility" that the Ninth Circuit may change its position. But the Ninth Circuit has consistently adhered to its position over a four year period; indeed, the concurring judges in *Brock* noted that the decision in that case was controlled by settled Ninth Circuit law. 667 F. 2d at 1324 (Adams, J., concurring) ("I am convinced * * * that the validity of warrantless beeper usage within the Ninth Circuit is not, in light of previous decisions of this Court, an open question"); *id.* at 1325 (Fletcher, J., concurring) ("Ninth Circuit precedent * * * compels the result * * * reache[d]"). Thus, respondent's assertion that the existing conflict may disappear is ascribable to nothing more than wishful thinking on his part.

Respondent also claims (Br. in Opp. 2) that the decision below is distinguishable from, and therefore not inconsistent with, the Tenth Circuit's decision in *United States* v. *Clayborne*, 584 F. 2d 346 (1978). Respondent points out that *Clayborne* involved the warrantless monitoring of a beeper located in a commercial establishment to which the public had access, and that the court in *Clayborne* noted in passing that the monitoring of the beeper inside the defendant's residence—which did not produce any evidentiary fruit—was "clearly illegal." 584 F. 2d at 351 n.3. This statement, however, is merely dictum, because no evidence resulted from the monitoring inside the home. Moreover, the distinction that respondent purports to draw between *Clayborne* and this case is not constitutionally significant. Here, the agents monitored the beeper while it was on respondent's property, but there is no evidence that the beeper was inside respondent's cabin when the monitoring

occurred. Indeed, when the agents searched respondent's cabin and surrounding area several days later, they found the can containing the beeper outside the cabin. Assuming that the location of the beeper is at all significant for Fourth Amendment purposes (an assumption with which we disagree because of the minimal nature of the intrusion involved in beeper surveillance), there can be little, if any, constitutional difference between the monitoring of a beeper located in a yard outside a house and the monitoring of a beeper inside private commercial premises. Finally, despite respondent's attempt to distinguish *Clayborne*, we note that the majority below itself acknowledged that its decision was in conflict with *Clayborne* (Pet. App. 5a-6a).

2. Respondent argues (Br. in Opp. 2-3) that this case is also distinguishable from the automobile beeper cases cited in our petition (at 12-13) because here the beeper "was used to determine the final resting place of the chemical drum within which it ha[d] been placed—a barrel located adjacent to the rural cabin where respondent lived" (Br. in Opp. 2). But the record shows only that the agents located the beeper's signals as coming from somewhere on respondent's property (H. 7; Tr. 105).[1] This is precisely the same information that could have been obtained by monitoring a beeper attached to co-defendant Petschen's automobile after it had arrived on respondent's property, or by visual surveillance of Petschen's car until it turned from the public road onto respondent's property. Thus, the fact that the container was out of public view at the time the beeper's signals were monitored does not establish that respondent had a legitimate expectation of privacy in the arrival of the chemicals on his property.

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[1]The agents did not discover the precise location of the container in which the beeper had been placed until several days after concluding the beeper surveillance, when they executed a warrant to search respondent's cabin and surrounding property.

3. Respondent, like the majority below, fails to come to grips with our argument that the warrantless use of beepers is constitutionally permissible because the limited information conveyed by a beeper involves a minimal intrusion, if any, on legitimate privacy interests (see our petition at 13-16). This is the theory that underlies the decisions in such cases as *United States* v. *Dubrofsky, supra*, and *United States* v. *Clayborne, supra*, which the majority below refused to follow. We submit that the time is ripe for this Court to resolve the split between the circuits on this important Fourth Amendment issue.

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JUNE 1982

Petitioner's Brief

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No. 81-1802

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v.

LEROY CARLTON KNOTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the warrantless monitoring of a beeper to aid in locating a drum containing chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment.*

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* In addition to the parties listed in the caption, co-defendant Darryl Petschen was a party to the proceedings below, but is not a respondent herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1802

UNITED STATES OF AMERICA, PETITIONER

v.

LEROY CARLTON KNOTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 662 F.2d 515. The opinion of the district court (Pet. App. 12a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on October 30, 1981. A petition for rehearing with a suggestion for rehearing en banc was denied on December 29, 1981 (Pet. App. 19a). On February 17, 1982, Justice Blackmun extended the time within which to file a petition for a writ of

certiorari to and including March 29, 1982. The petition was filed on that date and was granted on June 21, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, respondent was convicted of conspiracy to manufacture controlled substances, including but not limited to methamphetamine, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment.[1]

1. The evidence showed that on June 14, 1979, Agent Timothy Shanley, a narcotics investigator for the Minnesota Bureau of Criminal Apprehension, received information from the 3M Company, a chemical

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[1] Co-defendant Tristan Armstrong pleaded guilty and was sentenced to three years' imprisonment, all but six months of which was suspended in favor of probation, with the further provision that he serve those six months on work release. Co-defendant Darryl Petschen was tried jointly with respondent. He was convicted and sentenced to five years' imprisonment. His conviction was affirmed by the court of appeals (see Pet. App. 7a), and his petition for a writ of certiorari was denied (No. 81-6089, June 21, 1982).

company in St. Paul, Minnesota, that co-defendant Tristan Armstrong, a former 3M employee, had been stealing phenylacetone and other chemicals that are essential precursors (starter materials) in the manufacture of amphetamine and methamphetamine (H. 2-3; Tr. 46-47, 196, 210).[2] A search of Armstrong's laboratory at 3M uncovered documents linking him to a residence on Leone Street in St. Paul, where, through visual surveillance, agents saw co-defendant Darryl Petschen and others moving laboratory equipment and furniture into a truck (H. 3; Tr. 50-51, 57-58, 60-61). Thereafter, Agent Shanley examined the vacated premises with the landlord's permission (H. 4; Tr. 63-64). He found tubing, glassware and miscellaneous laboratory equipment amid several piles of garbage (Tr. 64). He also found a white powder which, upon analysis, was found to contain a chemical byproduct of the amphetamine synthesis (H. 4; Tr. 65-66, 262).

Subsequent investigation revealed that Armstrong had been placing numerous orders for chemicals with the Hawkins Chemical Company in Minneapolis (H. 5; Tr. 73-74, 81-85, 89). When Agent Shanley was informed that Armstrong was scheduled to pick up one such order from Hawkins, including a quantity of chloroform, on February 28, 1980, Shanley obtained permission from the company to place the chloroform inside a five-gallon drum containing a beeper before delivery to Armstrong (H. 5-6; Tr. 100-101).[3] On the scheduled date, investigating

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[2] "H." refers to the transcript of the preliminary hearing, which the parties stipulated could be considered by the district court in ruling on the suppression motion (see May 28, 1980 Tr. 6-7). "Tr." refers to the trial transcript.

[3] A beeper is a battery-powered radio transmitter whose signal can be monitored by a radio receiver. The location

agents observed Armstrong pick up the order and drive to co-defendant Petschen's residence in St. Paul, where the packages of chemicals were transferred to the back seat of Petschen's vehicle (H. 5-6, 11; Tr. 73-74, 102). The agents followed Petschen as he drove his automobile into Wisconsin (H. 6; Tr. 104, 106-107). At times the agents lost sight of Petschen's vehicle and relied upon the beeper signal emitted from the drum to keep track of Petschen's whereabouts (H. 7; Tr. 103-104). During most of the surveillance Petschen drove at a steady pace of 55 miles per hour and did not appear to be trying to avoid detection (Tr. 104). At about 3:30 p.m., however, Petschen began making evasive maneuvers, and the agents terminated their visual surveillance (Tr. 105). Approximately one hour later, the agents located the beeper signal in the vicinity of a cabin occupied by respondent Knotts near Shell Lake, Wisconsin (H. 7; Tr. 105, 108-109). The agents then established intermittent visual surveillance of respondent's property until the following day, when they saw respondent and Petschen leave the area (Tr. 107-108).

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of the beeper is determined by the strength of the signal and the direction from which it is received. Beepers used by law enforcement authorities are of two types. The first, and the kind of beeper used in this case, is a beacon transmitter, which emits a constant periodic signal at a set frequency. The second type emits a signal only upon receipt of another designated radio signal. Known as a "transponder," this type of beeper is used primarily on aircraft and ships, where a beacon transmitter would interfere with navigation equipment. Both serve the same law enforcement function, however, and their functional differences are irrelevant to the Fourth Amendment principles discussed in this brief.

Three days later, federal and state agents executed a warrant authorizing them to search respondent's cabin and surrounding property. In the course of executing the warrant, the agents discovered a fully operable clandestine drug laboratory behind wall paneling in the cabin (H. 8-9; Tr. 143). In the laboratory area the agents found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine (H. 9-10; Tr. 160, 162-163, 272-274). Hidden under a barrel outside the cabin the agents located the five-gallon drum of chloroform in which they had placed the beeper (Tr. 173-174).

2. Prior to trial, respondent moved to suppress the evidence found in the search of his cabin on the ground that the warrant authorizing that search was invalid because it was based on information derived from the warrantless use of the beeper, which, respondent contended, violated the Fourth Amendment. The district court denied the motion (Pet. App. 12a-17a). The court first concluded that the installation of the beeper with the consent of the chemical company "did not invade anyone's expectation of privacy and thus could not have violated the Fourth Amendment" (*id.* at 15a). The court then held that the subsequent monitoring of the beeper to determine the destination of the drum of chloroform did not violate respondent's Fourth Amendment rights because respondent could claim no legitimate expectation of privacy in the arrival on his property of a can of chemicals transported over public thoroughfares by another party (*id.* at 15a-16a). In addition, the court concluded that the monitoring of the beeper's signals for a brief period after the drum was deposited on respondent's property was not a search within the

meaning of the Fourth Amendment (*id.* 16a-17a). Accordingly, the court ruled that the subsequent warrant-authorized search of respondent's cabin based on information gained by use of the beeper was valid (*id.* at 17a).

3. A divided panel of the court of appeals reversed respondent's conviction (Pet. App. 1a-11a). Stating that the other circuits that addressed the question had taken conflicting positions, the majority held that law enforcement officers must obtain a warrant before using a beeper to determine the location of noncontraband materials that have been placed in a private area or withdrawn from public view (*id.* at 4a-7a).[4] The majority acknowledged that the courts have upheld the warrantless use of beepers as an aid to visual surveillance in tracking the route taken by an automobile over public roads, but it concluded that in this case the item to which the beeper was attached passed "into the private sphere protected by the Fourth Amendment" when the "beeper's signal was lost and found again only after the beeper-laden drum was on private property out of public view" (*id.* at 6a-7a).

Judge Henley dissented (Pet. App. 8a-11a). He first expressed some doubt as to whether the monitoring of a beeper is a search within the meaning of the Fourth Amendment (*id.* at 8a). Even if the use of a beeper is a search, Judge Henley concluded that there can be no greater expectation of privacy in the location of chemicals intended for use in the manufacture of illegal drugs than in the location of known con-

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[4] Citing the maxim *caveat emptor*, the court of appeals agreed with the district court that the initial attachment of the beeper with the consent of the chemical company did not offend the Fourth Amendment, even though the company intended to sell the drum to an unsuspecting buyer (Pet. App. 4a n.2).

traband, which an individual has no legal right to possess (*id.* at 8a-11a). In Judge Henley's view, the agents had probable cause to believe that the chloroform was intended for illegal use at the moment they saw co-defendant Armstrong load the chloroform into his automobile, and they thus could have seized the chloroform for immediate forfeiture under 21 U.S.C. 881(a)(2) (Pet. App. 11a n.1). In these circumstances, Judge Henley concluded that "[respondent] had no legitimate expectation of privacy in the location of the chloroform that was violated by monitoring the beeper" (*id.* at 11a).

SUMMARY OF ARGUMENT

The court of appeals held that the warrantless monitoring of a beeper to locate a drum of chemicals on respondent's property violated the Fourth Amendment. This holding raises two distinct questions: (1) whether the use of the beeper in the circumstances of this case was a search or seizure for Fourth Amendment purposes, and (2) if so, whether the beeper surveillance was reasonable under the Fourth Amendment.

I

In determining whether the Fourth Amendment is implicated at all by a particular law enforcement action, the central inquiry is whether that action has invaded the legitimate privacy expectations of the person challenging it. See *Katz* v. *United States*, 389 U.S. 347 (1967); *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Smith* v. *Maryland*, 442 U.S. 735 (1979). As with other, more traditional law enforcement surveillance techniques, such as visual observation, radar, or bloodhounds, the use of a beeper to follow the movements and determine the whereabouts of a ve-

hicle does not constitute a search or seizure because an individual has no legitimate expectation of privacy in his public travels. By exposing his activities to public view, the individual assumes the risk that those activities will be observed by, or reported to, the police. Moreover, the inapplicability of the Fourth Amendment to the use of beepers and similar surveillance techniques does not depend on the fortuity that someone may actually have observed the vehicle's movements, because the individual could not reasonably have expected that his public travels would go unnoticed. The Fourth Amendment does not prevent an officer from using a more efficient means to acquire information that he otherwise could have acquired by using his own senses. Accordingly, no particular degree of suspicion is required by the Fourth Amendment as a precondition to the use of a beeper or similar techniques to assist law enforcement authorities in tracking the public movements of persons or vehicles.

II

The Fourth Amendment imposes two separate requirements on law enforcement activities. First, the Amendment declares that the right to be free from unreasonable searches and seizures shall not be violated. Second, the Amendment states that all warrants must be supported by probable cause and must particularly describe the place to be searched and the persons or things to be seized. Assuming the applicability of the Fourth Amendment to beeper surveillance, it is necessary to decide what level of information is required to render the "search" effected by a beeper reasonable, and whether, if probable cause is required, it is nevertheless reasonable to conduct such surveillance without first procuring a warrant.

A. It is our submission that if the monitoring of a beeper be deemed a "search," it is so minimally intrusive into legitimate privacy interests that it may be justified as being reasonable under the Fourth Amendment on the basis of reasonable suspicion of criminal activity. This Court has recognized that certain law enforcement actions that qualify as Fourth Amendment searches or seizures nevertheless are not so intrusive as to require probable cause. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1978). In determining the reasonableness of such actions in particular contexts, the Court has balanced the public interest against the individual's Fourth Amendment interest.

In the context of this case, because the societal concern with drug enforcement outweighs the limited intrusion on privacy concerns occasioned by the use of a beeper, such an intrusion may be justified on less than probable cause. The public interest in investigating and uncovering unlawful drug activity is substantial, if not compelling, and the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures such as the clandestine drug laboratory in this case. On the other hand, the use of a beeper, which conveys only a narrow piece of information (its present location), constitutes a sharply limited invasion, if any, on an individual's legitimate expectations of privacy. Here, for example, the agents used the beeper to ascertain that Petschen's automobile had turned from a public road onto respondent's property. This same information could have been obtained from visual observation, but even if it could not have, the beeper surveillance interfered minimally, if at all, with respondent's legitimate privacy interests. In this respect a

beeper "search" is dramatically different from a conventional search of the kind that must be justified by probable cause.

B. If reasonable suspicion is sufficient to justify use of a beeper, it follows that the Fourth Amendment does not require a warrant, which may only be issued on probable cause. Even if probable cause is required before beeper surveillance may be undertaken—and probable cause was clearly present here—the court of appeals erred in imposing a warrant requirement.

Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search or seizure. Nevertheless, the Amendment does require that searches and seizures be reasonable, and this Court has held that most types of searches may not ordinarily be deemed reasonable unless authorized by a warrant issued by a neutral and detached magistrate and satisfying the prerequisites of the Warrant Clause of the Fourth Amendment. But exceptions to the warrant requirement have been recognized in certain situations in which, after balancing the intrusion into individual privacy interests against societal law enforcement interests, the Court has concluded that the costs of obtaining a warrant outweigh the justifications for seeking antecedent judicial control of the search.

In short, the issue whether a particular type of search must be supported by a warrant in order to be reasonable under the Fourth Amendment cannot be decided without consideration of the magnitude of the individual privacy interest implicated. Given the extremely limited intrusion into legitimate privacy expectations entailed by the monitoring of a beeper, we submit that the reasonableness of such

monitoring should not turn on whether it was authorized by a warrant. Indeed, the policies served by a warrant in protecting the interests of the individual against unreasonable governmental intrusion have little, if any, application in the beeper context.

First, because beeper surveillance must be conducted surreptitiously, a beeper warrant would not serve to notify those whose movements are monitored, or whose connection with a package or vehicle is ascertained by use of the beeper, of the existence of authority to conduct the surveillance and of the permissible scope of the surveillance. Second, it is impossible to limit the scope of the search by restricting the agents in advance to monitoring the beeper's signals only from certain specified locations, because the whole purpose of undertaking this type of surveillance is to ascertain the beeper's unknown destination. Nor would a time limitation in a beeper warrant advance any meaningful privacy interest in the case of a beeper inserted into a can of chemicals that the authorities reasonably believe will be used to manufacture illegal drugs, both because the intrusion occasioned by use of the beeper is so slight and also because the probability that the chemicals have been or will be used for an illegal purpose does not diminish over time.

Moreover, the benefits of interposing a neutral magistrate to determine whether justification for a search or seizure exists cannot be divorced from consideration of the degree of intrusion into protected privacy interests occasioned by the proposed law enforcement action. Any intrusion upon cognizable Fourth Amendment privacy interests that results from use of a beeper is not comparable to the intrusions that accompany searches and seizures that have been required to be authorized by warrant. The

availability of post-search judicial review is adequate to control that slight intrusion and to deter any abuses that may occur.

The societal costs of requiring antecedent judicial authorization in the case of a beeper or similar enhancement devices are substantial. The usefulness of such devices would be diminished if the police were required to obtain a warrant, or justify their failure to do so, each time they sought to use an enhancement device in the course of an investigation into criminal activity. Moreover, requiring warrants for marginally intrusive devices such as beepers would trivialize the warrant procedure itself.

ARGUMENT

THE WARRANTLESS MONITORING OF A BEEPER TO LOCATE A DRUM OF CHEMICALS ON RESPONDENT'S PROPERTY WAS PERMISSIBLE UNDER THE FOURTH AMENDMENT

A beeper is an electronic device that surreptitiously broadcasts its whereabouts, thus permitting law enforcement officers to follow the movements and ascertain the location of the vehicle or object to which the beeper is attached without themselves being detected. Some beepers also signal that the package in which they have been placed has been opened. Beepers have been used primarily in drug investigations to uncover illegal trafficking and manufacturing schemes.[5] For example, beepers have enabled government agents to track airborne drug smugglers, or, as in this case, to

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[5] But see *United States* v. *Frazier*, 538 F.2d 1322 (8th Cir. 1976), cert. denied, 429 U.S. 1046 (1977) (beeper attached to vehicle of suspected extortionist); *United States* v. *Bishop*, 530 F.2d 1156 (5th Cir. 1976) (beeper put in package of money taken in bank robbery).

locate clandestine drug laboratories. Agents have installed beepers on or in conveyances, such as airplanes or automobiles, and inside packages, including those that contain contraband and those containing noncontraband material used to manufacture illegal drugs. While there are certain basic Fourth Amendment principles that are applicable to beeper use generally, because of the different contexts in which beepers are utilized it may not be possible in one case to resolve all of the questions concerning the permissibility of beeper surveillance.

Cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. In this case, respondent conceded (Resp. C.A. Br. 13 n.1) and both courts below concluded (Pet. App. 4a n.2; *id.* at 15a) that the installation of the beeper inside the drum of chloroform with the consent of the chemical company did not violate the Fourth Amendment. This decision is in accord with the decisions of other courts in similar circumstances.[6] The only remaining issue con-

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[6] See *United States* v. *Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). In analogous contexts, courts have also held that no Fourth Amendment rights are infringed by the warrantless attach-

cerns the permissibility under the Fourth Amendment of the agents' actions in monitoring the signals transmitted by the beeper after the chloroform drum was picked up from the chemical company by co-defendant Armstrong and transported by co-defendant Petschen to respondent's cabin. In addressing this issue, we will consider whether the monitoring of the beeper in the circumstances of this case was a search or seizure within the meaning of the Fourth Amendment, and, if so, whether it was reasonable under the Fourth Amendment for the law enforcement officers to monitor the beeper's signals without first obtaining a warrant.

A. The Monitoring Of The Beeper Was Not A Search Or Seizure

1. Not all surveillance techniques employed by the police implicate Fourth Amendment concerns. For example, in *United States* v. *Lee*, 274 U.S. 559, 563 (1927), this Court held that the use of a searchlight at night by Coast Guard officers to illuminate the deck of the defendant's motor boat did not constitute a search. In a unanimous opinion by Justice Brandeis,

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ment of a beeper on property by an invitee (*United States* v. *Arredondo-Morales*, 624 F.2d 681, 684-685 (5th Cir. 1980); *United States* v. *Conroy*, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979)), or by the installation of a beeper on the exterior of a car or airplane parked in a location accessible to the public (*United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981); *United States* v. *Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *United States* v. *Moore*, 562 F.2d 106, 111-112 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976)). Because the installation issue was resolved in the government's favor below, we did not include it in our petition for a writ of certiorari.

the Court observed that "[s]uch use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Ibid.*

As this Court has made clear in more recent cases, the reason that certain surveillance techniques are deemed not to constitute a search for Fourth Amendment purposes is that they do not infringe the legitimate privacy expectations of the persons challenging their use. This point may be illustrated by comparing *Smith* v. *Maryland*, 442 U.S. 735 (1979), with *Katz* v. *United States*, 389 U.S. 347 (1967).

In *Katz*, government agents intercepted telephone conservations by attaching an electronic listening device to the outside of a public telephone booth. Rejecting the notion that no search had occurred because there had been no physical penetration into a "constitutionally protected area," the Court noted that

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

389 U.S. at 351-352. Although Katz had placed his calls from a place where he might have been seen, the Court pointed out that "what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* at 352. Because the government's interception of Katz' conversations "violated the privacy upon which he justifiably relied while using the telephone booth," the Court concluded that it constituted a search and seizure under the Fourth Amendment. *Id.* at 353.

In his concurring opinion in *Katz*, Justice Harlan noted that, in determining whether the Fourth Amendment applies to a particular government action, the courts must consider: (1) whether the individual has "exhibited an actual (subjective) expectation of privacy," and (2) whether that expectation is "one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361. As Justice Harlan explained (*ibid.*):

> Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Since *Katz*, this Court uniformly has held that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith* v. *Maryland*, *supra*, 442 U.S. at 740. In *Smith*, the Court applied this test in concluding that the use of a pen register to record the numbers dialed on the defendant's telephone did not constitute a search within the meaning of the Fourth Amendment. Noting that a pen register acquires an extremely limited amount of information—it discloses only the numbers dialed from a particular telephone and not the contents of any conversation (442 U.S. at 741-742)—the Court concluded that Smith did not have a legitimate expectation of privacy regarding the numbers he dialed on his phone.

First, the Court observed that it was doubtful that telephone users generally entertain any actual expectation of privacy in the numbers they dial, because users typically are aware that they must convey phone numbers to the telephone company, that the company has facilities for recording this information, and that it does in fact sometimes record this information for a variety of legitimate business purposes. 442 U.S. at 742-743. The Court rejected Smith's argument that he demonstrated an expectation of privacy by using the telephone in his own home, noting (*id.* at 743; emphasis in original) that "[a]lthough [Smith's] conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed," because, regardless of his location, Smith had to convey that number to the telephone company in placing a call.

Second, the Court concluded that even if Smith had a subjective expectation of privacy with respect to the numbers he dialed, that expectation was not one that society is prepared to recognize as reasonable. Relying on cases holding that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,[7] the Court ruled that "[w]hen he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company" and thus "assumed the risk that the company would reveal to the police the numbers he dialed." 442 U.S. at 744. In so holding, the Court refused to accept Smith's argument that because phone compa-

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[7] *United States* v. *Miller*, 425 U.S. 435, 442-444 (1976); *Couch* v. *United States*, 409 U.S. 322, 335-336 (1973); *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963).

nies usually do not make records of local numbers called, an individual can reasonably expect that information to be private. Instead, the Court stated (*id.* at 745):

> The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police.

2. Unlike the electronic eavesdropping device employed in *Katz*, which enabled the police to intercept and record private conversations, a beeper, like a pen register, does not disclose the contents of any communications.[8] A beeper resembles a pen register in another respect: it conveys an extremely limited piece of information. As a pen register reveals only the numbers dialed from a particular telephone, a beeper reveals only the approximate location of the object to which it is attached.[9]

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[8] Accordingly, beepers, like pen registers, are not subject to regulation under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165-168 (1977); *Smith* v. *Maryland*, *supra*, 442 U.S. at 747 n.1 (Stewart, J., dissenting); *United States* v. *Moore*, *supra*, 562 F.2d at 110; *United States* v. *Bruneau*, *supra*, 594 F.2d at 1193 & n.5.

[9] In some cases, law enforcement officials have employed a beeper that transmits not only its location but also the fact that the package in which it has been installed has been opened, an event signaled by a change in the beeper's tone. See *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir.

Before examining whether respondent's legitimate privacy expectations were violated by use of the beeper in this case, it may be helpful to consider the Fourth Amendment implications of similar, but more traditional, law enforcement surveillance methods that are used to track an individual or an object from place to place. One such method, of course, is direct visual surveillance. To facilitate their ability to follow a suspect while themselves avoiding detection, the police may employ such enhancement devices as binoculars or radar. Or, when police have lost sight of a suspect, they may use an animal with an acute sense of smell, such as a bloodhound, to trace a suspect's trail and ascertain his whereabouts. Similarly, undercover agents may exchange marked money or merchandise in order to enable other officers to follow a suspect's trail.

We do not believe that it may seriously be contended that any of these methods triggers the protections of the Fourth Amendment. The reason for this is clear in the case of visual surveillance: an individual has no legitimate expectation that his public travels will go unnoticed. " A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974)

1981), cert. denied, No. 81-5828 (Mar. 1, 1982); *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978). Because the beeper involved in this case did not convey this information (and, so far as we know, did not have the capacity to do so), it is not necessary for the Court to consider any distinct Fourth Amendment implications that may relate to monitoring such a beeper. We note, however, our view that even if the use of such a device may be considered a search or seizure for Fourth Amendment purposes, the warrant requirement should not be applicable because the search is so limited in scope. See pages 28-40, *infra*.

(plurality opinion). See *Rakas* v. *Illinois*, 439 U.S. 128, 153-154 & n.2 (1978); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Thus, by exposing his activities to public view, an individual assumes the risk that those activities will be observed by, or reported to, the police. Moreover, it is of no moment that the suspect has chosen a little-traveled route where it would be unlikely that he would be seen; as *Smith* v. *Maryland* indicates, his subjective expectations of not being observed are not determinative.

The same considerations govern where bloodhounds or radar are used to follow and locate a suspect or an object. Whether the Fourth Amendment applies when these techniques are used does not turn on the fortuity of whether anyone actually saw the suspect's movements. The point is that the suspect could not reasonably have expected that his movements would not be detected. See *Smith* v. *Maryland*, *supra*, 442 U.S. at 745. And the consequence is that, as far as the Fourth Amendment is concerned, no particular degree of suspicion is required as a precondition to use of these techniques.[10]

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[10] The consequence of the conclusion that use of visual surveillance, bloodhounds, radar, or beepers to follow individuals is not a search is, of course, that the Fourth Amendment imposes no constraints upon police utilization of such techniques. While in theory this would mean that, if the resources were available, everyone could be followed and observed in his public activities, in practice the resources are not available; nor is the motivation likely to be present to apply these techniques randomly or without real suspicion of wrongdoing, since that would ordinarily prove to be an exceptionally inefficient and unproductive use of scarce law enforcement resources.

Some commentators have expressed special concerns about the potential for abuse inherent in use of modern technology, such as beepers, to acquire information about even the public

Several courts have correctly applied this reasoning in holding that the use of a beeper to follow the movements and determine the whereabouts of a vehicle does not constitute a search or seizure because an individual has no legitimate expectation of privacy in his public travels. See, *e.g.*, *United States* v. *Bruneau*, 594 F.2d 1190, 1197 (8th Cir.), cert. denied, 444 U.S. 847 (1979) (airplane); *United States* v. *Miroyan*, 577 F.2d 489, 492-493 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (airplane); *United States* v. *Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976) (car). See also *United States* v. *Michael*, 645 F.2d 252, 259 (5th Cir. 1981) (en banc) (C. Clark, J., concurring), cert. denied, 454 U.S. 950 (1981) (car); *United States* v. *Frazier*, 538 F.2d 1322, 1326 (8th Cir. 1976) (Ross, J., concurring), cert. denied, 429 U.S. 1046 (1977) (car).

3. For the same reasons that the use of a beeper to follow a vehicle does not amount to a search or seizure, the monitoring of the beeper in this case to ascer-

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activities of the citizenry. See 1 W. LaFave, *Search and Seizure*, § 2.7, at 420-423 (1978); Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. 1461, 1494 (1977). Today, at least, these concerns seem theoretical and speculative. But even granting their legitimacy it does not follow that the Fourth Amendment is the applicable mechanism to safeguard against such abuses. Should beepers (or policemen on foot) be employed to follow the movements of persons because of their unpopular political views or for other invidious purposes, there are other safeguards that may be more appropriately invoked, including the First Amendment or equal protection concepts derived from the Fifth and Fourteenth Amendments. Cf. *Oyler* v. *Boles*, 368 U.S. 448 (1962). And, of course, the legislative process is also available if prophylactic measures are deemed necessary or appropriate to guard against potential abuses of modern, efficient law enforcement techniques.

tain that co-defendant Petschen's automobile carrying the can of chloroform had arrived on respondent's property does not implicate Fourth Amendment concerns. The court of appeals attempted, however, to distinguish this case from the airplane and automobile beeper cases by stating that "[t]his is not a case of a beeper being *attached* to an automobile, so the ultimate issue is not whether there can be an expectation of privacy in the route taken by an auto over public roads" (Pet. App. 4a; emphasis added). But as the First Circuit stated in *United States* v. *Moore*, 562 F.2d 106, 111 n.2 (1977), cert. denied, 435 U.S. 926 (1978):

> For * * * fourth amendment purposes, where the issue is whether there was an invasion of a privacy interest, we think it makes better sense to classify the beepers functionally, i.e., by whether or not they were used to tail a vehicle, or else for some different purpose, rather than by whether the beepers were in a package or affixed to the vehicle's underbody. To the extent the packaged beeper was used to follow the vehicle, we think it presents the same fourth amendment problems as the attached beepers.

Thus, this case is similar to *United States* v. *Hufford*, 539 F.2d 32, 33-35 (9th Cir.), cert. denied, 429 U.S. 1002 (1976), *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978), and *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied, No. 81-5828 (Mar. 1, 1982), where beepers attached to packages were used to track the movement over public roads of vehicles carrying the packages. In this context, as the court observed in *Dubrofsky* (581 F.2d at 211; footnote omitted):

> Transmitting the package's location is merely an aid to what can be accomplished by visual sur-

> veillance. Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case.

Here, the movements of co-defendant Petschen's automobile until it turned onto respondent's property "were at all times in full view of the public * * *. The electronic beeper was merely a more reliable means of ascertaining where [Petschen] was going as he drove along the public road." *United States* v. *Hufford*, *supra*, 539 F.2d at 34-35. Hence, as the district court concluded (Pet. App. 15a-16a; emphasis in original), respondent "could not *reasonably* have expected to keep private the fact that the can had arrived at his residence."

The court of appeals rejected this reasoning, however, noting that respondent's "cabin was not found by watching or tracking the 'public' progress of Petschen in his car. Agents lost both natural and electronic 'sight' of Petschen and did not again pick up the signal from the bugged container until the container was stationary and out of public view at the cabin owned by [respondent]" (Pet. App. 6a). This conclusion overlooks the reasoning of *Smith* v. *Maryland*, *supra*, 442 U.S. at 745, where this Court rejected the argument that because the telephone company did not ordinarily record local numbers dialed on its subscribers' phones, a person using his phone could reasonably expect that information to be private. Just as the legitimacy of Smith's privacy expectation did not depend on the fortuity of whether or not the company elected to make a record of his calls, so too the legitimacy of respondent's privacy expectation does

not turn on whether or not the agents maintained visual or electronic surveillance of Petschen until he arrived at respondent's property.[11] Because Petschen's arrival *could* have been observed by the agents or by other members of the public, respondent may not claim a constitutionally cognizable expectation of privacy with respect to that information.[12]

In *United States* v. *Hufford*, *supra*, the Ninth Circuit confronted an argument identical to the one embraced by the court of appeals in this case. The district court in *Hufford* had concluded that use of a beeper in a can of chemicals to ascertain the destination of Hufford's vehicle was a search because the location of the garage in which Hufford parked his vehicle allegedly could not have been determined without the beeper's assistance. Rejecting the district court's view, the Ninth Circuit pointed out (539 F.2d at 34) that

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[11] Respondent may not, of course, claim any Fourth Amendment interest as to the beeper surveillance of Petschen's vehicle while Petschen travelled to respondent's cabin. See *Rakas* v. *Illinois*, *supra*. It is only with respect to the beeper signals that located the chemicals on his own property that respondent may even arguably raise a Fourth Amendment claim.

[12] The fact that respondent chose to establish his clandestine laboratory in a remote setting does not have any bearing on the applicability of the Fourth Amendment to the beeper surveillance undertaken here. While respondent's choice of location may have exhibited a subjective expectation of privacy, in the sense that respondent may have believed that his co-conspirators in the drug manufacturing venture would not likely be observed arriving at his property, this does not alter the fact that their arrival is on public roads in which respondent can stake no privacy claim and from which he has no legal power to exclude other persons. Thus, his hope of maintaining secrecy for his criminal endeavors may not properly be translated into a societally recognized expectation of privacy.

> the device only augments that which can be done by visual surveillance alone; with more agents and more automobiles or planes, Hufford's movements could have easily been followed without the use of a beeper. We see no distinction between visual surveillance and the use of an electronic beeper to aid the agents in following the movements of an automobile along public roads provided no Fourth Amendment violation occurred when the beeper was attached.

Here, as in *Hufford*, what the beeper provided was more efficient surveillance. With its assistance, fewer officers and equipment were necessary to ascertain the arrival of Petschen's vehicle at respondent's cabin. The decreased burden upon law enforcement resources has no implications, however, for respondent's legitimate expectations of privacy. Respondent's claim, in the final analysis, is that the beeper allows the agents to do better what they could do anyhow. This is nothing more than a claim that he has a constitutional right to benefit from possible flaws in the agents' visual surveillance methods. But this Court has rejected similar arguments in cases challenging the surreptitious recording of conversations by undercover agents, concluding that "[t]he Government did not use an electronic device to listen in on conversations it could not otherwise have heard." *Lopez* v. *United States*, 373 U.S. 427, 439 (1963). See *United States* v. *White*, 401 U.S. 745, 751 (1971) (plurality opinion). By the same token, the agents in this case did not learn anything with the beeper that they could not otherwise have seen. As Judge Wisdom pointed out in *Horton* v. *Goose Creek Independent School District*, 677 F.2d 471, 478-479 (5th Cir. 1982) (footnotes omitted), the Fourth Amendment does not "prevent

an officer from using a more efficient means to detect what he could detect by using his own senses. For instance, if an officer can track two vehicles at once by monitoring electronic beepers, there is no constitutional right to require the police department to assign two officers to the task in order to restrict them to use of their unaided vision." [13]

The inapplicability of the Fourth Amendment to the beeper monitoring in this case is not affected, as the court of appeals apparently thought (see Pet. App. 6a-7a), by the fact that several days after the monitoring occurred, when the agents executed a search warrant for respondent's cabin and surrounding area, the can containing the beeper was found underneath a barrel in respondent's yard and was therefore out of sight. To begin with, there is no evidence as to the precise location or visibility of the can on respondent's property when the beeper's signals were monitored. Moreover, the only information that the signals conveyed to the agents was that the can of chloroform was somewhere on respondent's property. This is precisely the same information that could have been obtained by visual surveillance of Petschen's car as it turned from the public road onto respondent's driveway. Thus, the legitimacy vel non of respondent's privacy expectation is not affected by the exact location of the beeper at the time it was monitored, because the information conveyed by the beeper was the same re-

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[13] Although the Fifth Circuit in *Horton* held that the use of a drug-detecting dog constituted a search (a conclusion with which we do not necessarily agree), it concluded that, as in the case of a beeper, the use of a dog to track a suspect does not present a Fourth Amendment issue because the police "could have traced the suspect's movements by following him, using unaided vision." 677 F.2d at 479 n.19.

gardless of where on respondent's property it may have been situated.[14]

Finally, the use of the beeper may not be characterized as a search or seizure merely because the beeper was "trespassing" on respondent's property. In *Hester* v. *United States*, 265 U.S. 57 (1924), two revenue officers entered onto the defendant's property and, from a distance of 50-100 yards from his house, saw the defendant hand another person what appeared to be a gallon jug of illicitly distilled whiskey. The Court held, in a unanimous decision authored by Justice Holmes, that the fact that the officers had trespassed on the defendant's property was not a reason for suppressing the observations made by the officers.

Hester stands for the proposition that a legal property interest is not necessarily equivalent to an interest protected by the Fourth Amendment, and the Court has consistently adhered to this view. Thus, in *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12, the Court noted that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." That proposition has relevance here, because respondent could not reasonably have expected that the arrival at his property of Petschen's automobile containing the can of chloroform would be free from observation. Accordingly, the use of the beeper to inform law enforcement agents of Petchen's arrival did not invade respondent's legitimate expectations of privacy.

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[14] Thus, it would also be of no moment if the can containing the beeper had been taken inside the cabin, since it discloses nothing about the contents of any non-public area into which it is taken other than the fact that it is there.

B. Even If The Monitoring Of The Beeper Was A Search Or Seizure, It Satisfied Fourth Amendment Standards Of Reasonableness

1. The use of a beeper is "reasonable" for Fourth Amendment purposes if it is based on a reasonable suspicion of criminal activity

Assuming that the use of the beeper in this case to trace Petschen's vehicle to respondent's property constituted a search subject to the Fourth Amendment, it was a "search" in only a very limited sense. The beeper revealed no information about respondent's property other than its own presence there. Because of the strictly limited nature of the information conveyed by a beeper, which is capable only of a very narrow intrusion, if any, on privacy interests, we submit that it is entirely reasonable under the Fourth Amendment to permit law enforcement officers to conduct beeper surveillance without a warrant on the basis of reasonable suspicion falling short of probable cause.

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has recognized, in a variety of situations, that certain law enforcement actions that qualify as Fourth Amendment searches or seizures are nevertheless not so intrusive as to require probable cause. In *Terry* itself, the Court noted that a policeman who stops a person on the street and frisks him for weapons has undoubtedly effected a "seizure" and "search" of that person within the purview of the Fourth Amendment.[15] However, because "the central inquiry under

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[15] As the Court in *Terry* explained (392 U.S. at 16):

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less

the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (392 U.S. at 19), the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken on less than probable cause, although the facts known to the officer must at least support a reasonable inference of unlawful activity and, for the frisk, that the person may be armed.

In subsequent cases, the Court has continued to recognize a narrow class of police activities that need not be justified by probable cause. For example, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976) (citations omitted), the Court stated:

> The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. * * * In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual * * *.

See, *e.g.*, *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). In upholding the routine stopping of vehicles at fixed checkpoints in the absence even of individualized suspicion, the Court in *Martinez-Fuerte* concluded that the government's substantial interest in operating such checkpoints in order to control the flow

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than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."

of illegal aliens outweighed the limited intrusion on the Fourth Amendment interests of the motoring public occasioned by stopping a vehicle, briefly questioning its occupants, and inspecting the parts of the vehicle that can be seen without a search.

Similarly, in a case where the monitoring of a beeper is undertaken, as it was here, to uncover a clandestine drug laboratory, the governmental interest outweighs the minimal intrusion, if any, into an individual's legitimate privacy interests. There can be little doubt that the governmental interest served by the beeper surveillance in this case was, at the very least, substantial. As Justice Powell observed in his concurring opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

As a practical matter, the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures. Because ingredients and equipment may be purchased legally, the only effective means of apprehension before the unlawful drug is distributed is to locate the drug laboratory. As the facts of this case nicely illustrate, discovery of a clandestine drug laboratory is a task re-

quiring considerable police organization and ingenuity. Even with the help of a beeper, the visual surveillance in this case involved a dozen agents, a helicopter, and several land vehicles (Tr. 109-110, 112).

In addition, as already noted, the use of a beeper constitutes a limited intrusion, if any, on legitimate privacy interests. A beeper does not conduct either a visual or aural search of the place into which it is taken. Even when taken inside a house, a beeper gives out one piece of information and one piece of information only: "Here I am."

The facts of this case underscore the limited information that a beeper conveys. Here, the agents used the beeper to ascertain that co-defendant Petschen's automobile, which they knew from visual observation was carrying the can of chloroform, had turned from a public road onto respondent's property. This information too could have been obtained as a result of direct visual surveillance, and thus the monitoring of the beeper interfered minimally, if at all, with respondent's legitimate expectations of privacy.

Because the substantial societal concern with drug enforcement outweighs the limited intrusion on Fourth Amendment privacy concerns that arguably are implicated by beeper surveillance, use of a beeper as an investigative tool to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot. In a similar situation, a plurality of the en banc Fifth Circuit concluded, in *United States* v. *Michael*, *supra*, that reasonable suspicion was sufficient to justify the monitoring of a beeper to locate a clandestine drug laboratory by tracking the movements of an automobile driven by the defendant. In reaching this result, the plurality

> consider[ed] the governmental interest in eliminating illegal drug manufacture to be a per-

> suasive reason to permit this minimally intrusive practice. An "intermediate response" based on something less than probable cause, is a proper investigatory tool to aid DEA agents in discovering and eliminating clandestine laboratory operations. In balancing the public concerns served by the use of the beeper, to discover Michael's drug manufacturing apparatus against the slight infringement of Michael's expectation of privacy, we find the beeper's use to be eminently reasonable.

645 F.2d at 259 (footnotes omitted).

It has often been said—and aptly in most situations—that the Fourth Amendment protects the guilty as well as the innocent from unreasonable searches. That this is ordinarily so is not on account of any special solicitude shown to law-breakers, but because at the time the decision is made to conduct a search (the decision the Fourth Amendment regulates), it is not yet established who is guilty and who is innocent. The requirements of probable cause and reasonable suspicion operate to limit the intrusion on individual interests protected by the Fourth Amendment to circumstances in which there is a sufficiently high likelihood that the intrusion will produce evidence of a crime or serve some other important societal interest. Such requirements are thus designed precisely to protect the innocent while stripping the probably or possibly guilty of the protection they would enjoy in the absence of well-founded suspicion. Thus, the proposition that the Fourth Amendment protects the guilty really means that the fact that the subject of a search is known to be guilty only *ex post* the search, and by virtue of what is disclosed thereby rather than by what was known *ex ante*, does not retroactively vindicate the official action. *But this is*

so only because the principle is necessary to protect the interests of the innocent.

Accordingly, when law enforcement authorities employ techniques that, by virtue of their specialized character or narrow focus, pose little threat of revealing to government agents any lawful private activities, the reasonableness requirement of the Fourth Amendment is not served by imposing upon those techniques the same requirement of probable cause as is imposed on conventional searches that by their nature reveal private matter to official eyes. Such specialized techniques include the specially trained dog, which is able to detect the odor of illegal drugs emanating from a package or container, as well as the electronic beeper involved in this case. Use of these techniques poses virtually no threat to the Fourth Amendment interests of the law abiding citizen, because they convey sharply limited information about matters that can be deemed private only in the most theoretical sense.

2. ***The use of a beeper should in any event not require a warrant***

As we have shown, a balancing of the pertinent governmental and individual interests supports the conclusion that beeper surveillance may be undertaken if the authorities reasonably suspect that criminal activity is afoot. If reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant, which may only be issued on probable cause, is not required under the Fourth Amendment. But even if probable cause is required, the monitoring of a beeper should not require a warrant.

Here, the agents had probable cause to believe that a crime was being committed and that evidence concerning that offense would be obtained through use

of the beeper. The agents knew that co-defendant Armstrong previously had stolen from his former employer chemicals that are precursors for the manufacture of amphetamine and methamphetamine. They also were aware that in more recent months Armstrong had purchased large quantities of precursor chemicals. In addition, the agents discovered, in a hastily abandoned apartment, the remains of a laboratory in which Armstrong and Petschen appeared to have been manufacturing (or attempting to manufacture) amphetamine. These facts clearly provided the agents with probable cause to believe that Armstrong and Petschen were engaged in an illicit drug manufacturing scheme. The facts also justified the belief that use of the beeper would uncover evidence of the scheme, because it was highly likely that Armstrong or Petschen would transport the can of chloroform to a clandestine laboratory where other possible participants in the conspiracy might be present. In these circumstances, use of the beeper to help uncover the location of the laboratory and identify other participants was a perfectly reasonable investigative technique.

The court of appeals did not question the existence of probable cause in this case. Instead, the court held that respondent's Fourth Amendment rights had been violated because the agents failed to obtain a warrant authorizing the use of the beeper. It is true that the court below sought to limit the impact of its holding to those situations in which the object to which a beeper has been attached is moved onto "private property out of public view" (Pet. App. 7a). As a practical matter, however, law enforcement agents will be forced to secure a warrant in every beeper case because they will have no way of knowing in advance the ultimate destination of the vehicle or

package in which they seek to install a beeper (indeed, ascertaining the destination is the whole point of the exercise).

The court of appeals erred in its imposition of a warrant requirement. Although this Court has stated in a variety of contexts that a warrant is presumptively required before a search of private property may be deemed reasonable under the Fourth Amendment, the warrant requirement is not absolute. Exceptions have been recognized "where it was concluded that the public interest required some flexibility in the application of the general rule," particularly where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979).

In our view, the issue whether a particular search must be supported by a warrant in order to meet the Fourth Amendment's standard of reasonableness cannot be decided without taking into account the magnitude of the individual privacy interest invaded by the search. This point may be illustrated by examining this Court's decisions recognizing the so-called "automobile search" exception to the warrant requirement. While the Court has relied on exigent circumstances to justify warrantless probable cause searches of automobiles stopped along the highway, the Court has also upheld car searches in the absence of any exigencies, based on the owner's diminished expectation of privacy in his automobile. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 12; *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 590 (plurality opinion); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Given the extremely limited intrusion into legitimate privacy interests entailed by the monitoring of a beeper, an intrusion

that is much narrower than that involved in a search of the private areas of an automobile, we submit that the reasonableness of such monitoring should not turn on whether it was authorized by a warrant.

Traditionally, a warrant has been described as serving three basic functions. First, as Justice Jackson wrote for the Court in *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted), "[i]ts protection consists in requiring that * * * inferences [from evidence relied upon to establish probable cause for a search] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Second, it is thought that a warrant tends to limit the scope of the search to bounds commensurate with the probable cause underlying its issuance. *United States* v. *Chadwick*, *supra*, 433 U.S. at 9. Third, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Ibid.* *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).

These policies have little, if any, application to the monitoring of signals from a beeper where, for example, the beeper is attached to a package of chemicals that is likely to be used to manufacture illegal drugs. To begin with, beeper surveillance cannot be effective unless it is carried out surreptitiously, without the knowledge of the person or persons transporting the package.[16] In addition, any search or seizure ef-

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[16] In the case of electronic eavesdropping, which involves a far greater intrusion into privacy interests than the use of a beeper, this Court has recognized that even though a warrant is required, interception of conversations may be

fected by the use of a beeper is inherently limited in scope because of the restricted technological capabilities of the beeper. As already noted, a beeper simply broadcasts its own location. Moreover, it is impossible to restrict the agents in advance to monitoring the beeper's signals from only certain specified locations, because when beeper surveillance is instituted it is not known where the beeper will ultimately end up. In this sense, it is impossible for a warrant to particularize the "place" to be "searched" by a beeper. The agents will almost never have probable cause to believe that the beeper will broadcast from any given location; the whole purpose for undertaking this type of surveillance is to locate the beeper's unknown destination.[17]

Although a beeper warrant could serve to limit the period of authorized surveillance (see *United States* v. *Bailey*, 628 F.2d 938, 945-946 (6th Cir. 1980)), the Fourth Amendment does not require that search warrants "must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to

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undertaken without advance notice because otherwise the whole purpose of the interception would be defeated. See *Katz* v. *United States*, *supra*, 389 U.S. at 355 n.16.

[17] Cf. *United States* v. *Issod*, 508 F.2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975), where the court concluded that government agents effecting a "controlled delivery" of narcotics could not have obtained in advance a warrant to arrest the person who would claim the boxes or to search the vehicle into which the boxes would be loaded because they could not satisfy the requirement of a warrant "particularly describing [the] place to be searched, and the person to be seized" until that person arrived to pick up the boxes.

proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.' " *Dalia* v. *United States*, 441 U.S. 238, 257 (1979) (footnote omitted). In addition, a time limitation would provide little, if any, meaningful protection of privacy interests in the case of a beeper inserted into a can of chemicals that the authorities reasonably believe will be used to manufacture illegal drugs. Any intrusion occasioned by use of the beeper is slight regardless of the duration of the surveillance. And continued monitoring of the beeper in this context is almost automatically justified, because the likelihood that the chemicals in the can have been or will be used in an illicit drug manufacturing operation does not diminish over time.

Furthermore, the benefits of interposing a neutral magistrate to determine whether justification for a search or seizure exists cannot be isolated from consideration of the degree of intrusion into protected privacy interests occasioned by the proposed law enforcement action. An officer who searches a house or taps a telephone without probable cause has intruded unjustifiably into an area to which our society attaches strong privacy interests, causing a grave and largely irreparable injury. If the prophylaxis of a warrant requirement avoids even a relatively small number of unreasonable searches of this nature, the personal security of the citizenry will have been meaningfully advanced. The same cannot be said in the context of beeper surveillance, because in the typical beeper case the information conveyed by the beeper—that a vehicle or a package whose contents are known to the authorities has arrived or is situated at a particular location—could have been ob-

tained through direct visual surveillance without any intrusion into legitimate privacy interests. Even if the use of a beeper might be said in some instances to intrude to some extent upon cognizable Fourth Amendment privacy interests, that slight intrusion is simply not comparable to the intrusions occasioned by searches and seizures that have been required to be authorized by warrant. It can be adequately controlled, and abuses deterred, by the availability of post-search judicial review.

On the other hand, requiring procurement of a warrant to achieve the marginal benefits of antecedent judicial control of these limited intrusions in the case of a beeper or a similar enhancement device would entail significant costs. The usefulness of such devices would be needlessly diminished if the police were required either to comply with, or justify their failure to comply with, the warrant procedure each time they sought to employ an enhancement device in the course of a criminal investigation. See *United States* v. *Michael*, *supra*, 645 F.2d at 259 (C. Clark, J., concurring).

Moreover, the principal cost would be a dilution of the effectiveness of the warrant procedure itself. As Professor LaFave has stated:

> Use of the warrant process to deal with police practices which present only a "minor peril to Fourth Amendment protections," it could well be argued, would tend to downgrade that process and thus might tempt magistrates to be less cautious in exercising their warrant-issuing authority. That is, it may well be that, as a practical matter, the warrant process can best serve as a meaningful device for the protection of Fourth Amendment rights if it is used somewhat selec-

> tively to prevent those police practices which would be most destructive of Fourth Amendment values.

1 W. LaFave, *Search and Seizure* § 2.2, at 290 (1978) (foonotes omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

GLORIA C. PHARES
Attorney

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No. 81-1802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*,

v.

LEROY CARLTON KNOTTS, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR RESPONDENT

MARK W. PETERSON
FRIEDBERG & PETERSON
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626
Court-appointed Counsel for Respondent

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QUESTION PRESENTED

Under the Fourth Amendment, may the government utilize a beeper installed in non-contraband private property to determine the location of that property at a person's residence, without a warrant?

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1 W. La Fave, *Search and Seizure* 18, 23, 29, 34

STATEMENT OF THE CASE[1]

1. The use of the beeper which is the subject of this case began on February 28, 1980, when an agent of the Minnesota Bureau of Criminal Apprehension traveled to the Hawkins Chemical Company in Minneapolis, Minnesota and replaced, with the company's permission, a five gallon drum containing the beeper for a drum containing chloroform which had previously been ordered by co-defendant Armstrong. (Tr. 100-101).

Agents conducting surveillance at Hawkins Chemical observed Armstrong pick up the drum and then travel to co-defendant Petschen's residence in St. Paul, where the drum and other chemicals were transferred to Petschen's vehicle. (Tr. 102). When Petschen left, agents followed him to his farm house in Scandia, Minnesota, using the beeper to assist surveillance. (Tr. 102-103). Petschen left after a short time, and agents then followed him east towards Wisconsin, but near the border lost visual sight and then beeper contact for approximately one half hour. (Tr. 104). Contact was then re-established through use of the beeper, and Petschen's vehicle was located just across the border in Wisconsin. *(Ibid.)*.

As he was being followed, Petschen maintained a steady pace an did not appear to detect surveillance. *(Ibid.)*. About 3:30 Petschen started driving evasively, however, and agents therefore terminated visual surveillance. (Tr. 104, 109). After that, beeper contact with Petschen was also lost, and was not re-established until approximately one hour later, when the beeper signal

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[1] In accordance with the government's Statement, references to the trial transcript are designated "Tr." and references to the preliminary hearing are designated "H."

was picked up and determined to be coming from the location of Respondent's cabin. (H. 7; Tr. 105, 109). The cabin itself is located in a remote area, with no other residences nearby (Tr. 134), and "No Trespassing" signs were posted to keep uninvited visitors off the premises. (Tr. 137, 140).

Agents then established surveillance at the cabin, but nothing noteworthy occurred through that evening (Tr. 107) and at some point surveillance was terminated. (Tr. 110). Surveillance was not re-established until approximately twelve hours later, in the early afternoon of February 29th. (Tr. 109). About 4:30 that afternoon, agents observed Petschen's vehicle leave Respondent's residence with Respondent as the passenger. (Tr. 108, 110).

Three days later, a search warrant was executed at Respondent's residence, resulting in the discovery of convictive evidence. (Tr. 133). During execution of the search, the drum containing the beeper was found hidden underneath a barrel just outside the cabin. (Tr. 174).

2. In overruling Respondent's motion to suppress the evidence obtained from his cabin, based upon the warrantless utilization of the beeper, the district court found that "[t]here is no evidence that defendant exhibited a subjective expectation of privacy in the arrival at his house of the can of chloroform which had been transported there on public thoroughfares by other persons." (Pet. App. at 15A).

In addition, the district court found that had Respondent exhibited a subjective expectation of privacy, such expectation would not have been recognized by society as reasonable because "[t]he ultimate destination of the can was readily determinable through visual surveillance of Mr. Armstrong and Mr. Petschen." (Pet. App. at 15A).

Thus, relying upon "surveillance assistance" cases and treating the issue as involving the arrival of the drum containing the beeper instead of monitoring after arrival, the district court concluded that although the monitoring of the beeper took place while the drum was located on Respondent's premises, it did not invade any reasonable subjective expectation of privacy and therefore was not a search within the Fourth Amendment. (Pet. App. at 16A-17A).

3. In reversing the decision of the district court, the Court of Appeals found that Respondent, as resident of the property, did have "a reasonable, legitimate expectation of privacy in the kind and location of objects out of view on his land." 662 F.2d at 518. In reaching this conclusion, the Court viewed the issue more narrowly than the district court:[2] "is . . . the monitoring of a beeper placed in an item of non-contraband personalty a search subject to the Fourth Amendment restrictions." 662 F.2d at 517 (fn. omitted). The Court noted that the issue was not the use of a beeper to assist surveillance in a vehicle traveling on public roads. *Ibid.*

In concluding that the Fourth Amendment warrant requirement was applicable, the Court of Appeals stated:

> Expectation of privacy is the touchstone of Fourth Amendment protections, and expectations of privacy do not depend on the artfulness and suavity of the invasive means of government agents. In the present case the beeper's signal led police agents to a drum of chloroform beneath a wooden barrel in the yard of a

[2] The district court stated the issue as: "What is one's reasonable, subjective expectation of privacy in the location of a can of chloroform purchased and transported to one's residence by other persons less than two hours previously?" (Pet. App. at 15A).

> remote rustic cabin. This cabin was not found by watching or tracking the "public" progress of Petschen in his car. Agents lost both natural and electronic "sight" of Petschen and did not again pick up the signal from the bugged container until the container was stationary and out of public view at the cabin owned by Knotts. 662 F.2d at 518.

The Court also distinguished the circumstances here from a case where a beeper is used only to aid surveillance of a vehicle traveling on public ways:

> The argument raised by the government, that 'use of a beeper to monitor the path of an object contemplates use of a beeper to determine its final resting place' proves too much in this case. As noted above, a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment. It did so in this case, where the beeper's signal was lost and found again only after the beeper-laden drum was on private property out of public view. 662 F.2d at 518.

SUMMARY OF ARGUMENT

Law enforcement agents utilized, without a warrant, a beeper to determine the location of a drum containing non-contraband chemicals at Respondent's residence. The Court of Appeals held that the monitoring with the beeper constituted a search under the Fourth Amendment and because it was conducted without a warrant it was unlawful. The essential question presented to the Court is whether the Court of Appeals erred in its

application of basic and well-established Fourth Amendment constitutional doctrine in reaching this conclusion.

I.

Resolution of the issue as to whether monitoring with the beeper constituted a search depends upon whether Respondent had a legitimate expectation of privacy in the drum containing non-contraband chemicals located at his residence. Resolution of this basic question depends upon whether Respondent exhibited an actual (subjective) expectation of privacy at his residence and if so, whether society recognizes that expectation as reasonable. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979).

Although the beeper was initially utilized to assist agents conducting surveillance in following Respondent's co-defendant as he traveled on public roads, the beeper's signal was lost during his travels, as was visual sight. The signal from the beeper was not picked up again until the chemical drum had come to rest at Respondent's residence, a rural secluded cabin with "No Trespassing" signs posted at the driveway entrance.

It is Respondent's contention, as found by the Court of Appeals, that because the drum containing chemicals was not contraband and because it was possessed at his residence, he had a legitimate expectation that the police would not monitor the presence of that property without a warrant. By use of the beeper, the agents learned that which they could learn no other way — the location of the drum — and because they neither sought nor obtained judicial authority to do so, their actions were invalid.

II.

A. In interpreting the Fourth Amendment's proscription against unreasonable searches and seizures, this Court has long adhered to the rule that warrantless searches and seizures are unreasonable per se, subject to a number of exceptions which are not applicable here. Assuming the monitoring of the beeper at Respondent's residence to have been a search, it therefore violated the Fourth Amendment.

The government has failed to take into account the warrant clause of the Fourth Amendment in arguing that the beeper monitoring should be approved because it was reasonable, and their argument must fail for that reason. Privacy at one's own residence is afforded the greatest protection possible under the Fourth Amendment and must remain inviolate absent a warrant or exigent circumstances.

Cases relied upon by the government in support of their "reasonableness" argument are not germane to the Fourth Amendment inquiry here. They all involve activity which is less intrusive than the search here, and by their very nature are not subject to the use of a warrant because their occurrence could not be anticipated by the police.

The one case which allows beeper surveillance based on "reasonable suspicion" appears to have been wrongly decided because it did not consider the applicability of the warrant clause. In any event, it should not be followed because it would allow invasion of privacy at a person's residence on less than probable cause.

B. The Court of Appeals did not err in applying the warrant requirement to activity which constitutes a

search; this Court has long imposed this requirement upon law enforcement officials.

To impose the warrant requirement on police personnel who intend to conduct beeper surveillance on private property will not result in any significant increased burden upon law enforcement and may, in fact, ultimately make their jobs easier. In addition, it will serve the significant societal interest in interposing the objective judgment of a magistrate between police officers and individuals suspected of crime, in placing limits on the authority to be exercised by officials conducting searches, and in assuring citizens that their privacy has not been invaded without proper judicial authorization.

The invasion of privacy which would result if warrants are not required for beeper surveillance of private property are substantial. Unregulated beeper monitoring would allow the government to determine the whereabouts of citizens and/or their property twenty-four hours a day, for an unlimited period of time, and essentially turn them into broadcasters of their own activities without their knowledge or consent.

ARGUMENT

THE WARRANTLESS MONITORING OF A BEEPER TO DETERMINE THE LOCATION OF THE DRUM OF NON-CONTRABAND CHEMICALS AT RESPONDENT'S RESIDENCE WAS UNLAWFUL UNDER THE FOURTH AMENDMENT

INTRODUCTION

The use of electronic surveillance devices to assist law enforcement efforts has always received judicious scrutiny by this Court because of the "grave constitutional

questions"[3] which are involved with this sophisticated equipment. This Court has never approved the installation of an electronic surveillance device at a residence without a warrant[4] and to allow it here would be contrary to well-established constitutional doctrine which precludes warrantless invasions of privacy. As observed by Justice Brandeis, the makers of our Constitution

> conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. *Olmstead* v. *United States*, 277 U.S. 438, 478-9 (1928) (Brandeis, J., dissenting).

In determining the appropriate resolution of the issue with which the Court is presented, it is perhaps easy to lose sight of the true Fourth Amendment interests which are implicated because, as the government points out repeatedly, a clandestine drug operation was involved and a beeper is a surveillance device which is only minimally intrusive in terms of content because it only

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[3] *United states* v. *White*, 401 U.S. 745, 779 (1971) (Harlan, J., dissenting); *Berger* v. *State of New York*, 388 U.S. 41, 56 (1967); *Osborn* v. *United States*, 385 U.S. 323, 329 n. 7 (1966); *Lopez* v. *United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in result).

[4] *Silverman* v. *United States*, 365 U.S. 505, 511-12 (1961); *Dalia* v. *United States*, 441 U.S. 238, 276 (1979) (Stevens, J., dissenting).

A warrantless, trespassory entry to install an electronic listening device was allowed in *Irvine* v. *California*, 347 U.S. 128 (1954) because the decision pre-dated *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The Court's opinion made it clear that the police conduct was not approved, however. 347 U.S. at 132.

"broadcasts" its own location and is incapable of intercepting conversations or relating other substantive information.

We respectfully submit that the Court should remain mindful that should it adopt the result maintained by the government, twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.[5] Without the limitations imposed by

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[5] It is pertinent to note that in the preponderance of beeper cases, warrants have been obtained. See,

United States v. *Hufford*, 539 F.2d 32, 33 (9th Cir.), *cert. den.* 429 U.S. 1002 (1976) (truck)

United States v. *Pretzinger*, 542 F.2d 517, 519 (9th Cir. 1976) (plane)

United States v. *Miroyan*, 577 F.2d 489, 491 (9th Cir.), *cert. den.*, 439 U.S. 986 (1978) (plane)

United States v. *Crowall*, 586 F.2d 1020, 1027 (4th Cir.), *cert. den.*, 440 U.S. 959 (1978) (plane)

United States v. *Washington*, 586 F.2d 1147, 1150 (7th Cir. 1978) (package containing contraband)

United States v. *Bruneau*, 594 F.2d 1190, 1193 (8th Cir.), *cert. den.* 444 U.S. 847 (1979) (plane)

United States v. *Reyes*, 595 F.2d 275, 278 (5th Cir. 1979) (plane)

United States v. *Chavez*, 603 F.2d 143, 145 (10th Cir.), *cert. den.* 444 U.S. 1018 (1979) (aircraft)

United States v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir.), *cert. den.* 450 U.S. 935 (1980) (chemical drum)

United States v. *Bailey*, 628 F.2d 938, 939 (6th Cir. 1980) (chemical drum)

United States v. *Sporleder*, 635 F.2d 809, 811 (10th Cir. 1980) (cardboard box)

United States v. *Cady*, 651 F.2d 290, 291 (5th Cir. 1981), *cert. den.* ___ U.S. ___, 102 S.Ct. 1274 (1982) (aircraft)

the warrant requirement itself, and the terms of any warrant which is issued, any person or residence could be monitored at any time and for any length of time. Should a beeper be installed in a container of property which is not contraband, as here, it would enable authorities to determine a citizen's location at any time without knowing whether his travels are for legitimate or illegitimate purposes, should the container be moved. A beeper thus would turn a person into a broadcaster of his own affairs and travels, without his knowledge or consent, for as long as the government may wish to use him where no warrant places a limit on surveillance. To allow warrantless beeper monitoring, particularly under the standard urged by the government here ("reasonable suspicion"), would allow virtually limitless intrusion into the affairs of private citizens.

In our discussion of the issue here involved we will, for the sake of convenience, attempt to follow the government's identification of sub-issues and progression of argument, and direct our observations accordingly. However, Respondent emphasizes at the outset that he does

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United States v. *Flynn*, 664 F.2d 1296, 1299 (5th Cir.), *cert. den.* ____ U.S. ____, 102 S.Ct. 1979 (1982) (plane)

United States v. *Whitley*, 670 F.2d 617, 618 (5th Cir. 1982) (plane)

United States v. *Long*, 674 F.2d 848, 851 (11th Cir. 1982) (plane)

United States v. *Dunn*, 674 F.2d 1093, 1096 (5th Cir. 1982) (hot plate "stirrer")

United States v. *Ellery*, 678 F.2d 674, 676 (7th Cir. 1982) (package)

United States v. *Cooper*, 682 F.2d 114, 115 (6th Cir. 1982) (package)

United States v. *Parks*, 684 F.2d 1078, 1080 (5th Cir. 1982) (plane)

United States v. *Sweeney*, 688 F.2d 1131, 1142 (7th Cir. 1982) (chemical drum)

not view the issue as broadly as the government[6] and submits that the narrower question which is actually involved is whether the government may, without a warrant, utilize a beeper installed in non-contraband property to determine the location of that property at a person's residence.[7]

A. Warrantless Monitoring With The Beeper Was A Search Subject To The Fourth Amendment.

Katz v. *United States*, 389 U.S. 347 (1967) is the seminal privacy-expectation case in this Court, and governs whether the use of the beeper to determine the location of non-contraband chemicals is a search. In *Katz*, the FBI attached an electronic listening and recording device to the outside of a public telephone booth without first obtaining a warrant. They then proceeded to intercept calls made by the defendant, and those calls were introduced at his trial for transmitting wagering information.

Rejecting first the notion of a "constitutionally protected area", the Court stated:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * * 389 U.S. at 351. (Citations omitted).

This language makes clear that the subjective manifestations of a person's attempt/desire to keep something from

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[6] Br. U.S. at 13-14.

[7] This narrower approach was the one taken by the Court of Appeals. 662 F.2d at 517, 518.

public knowledge is a consideration relevant to the Fourth Amendment inquiry.

The Court next rejected the government's contention that the absence of physical penetration or a technical trespass rendered inapplicable the Fourth Amendment. Because the constitutional protection is afforded to people, and not to areas, electronic surveillance of the defendant "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353. Therefore, the facts that the agents conducted their surveillance based upon probable cause, limited the scope and duration of the interceptions, and otherwise confined their listening so that had they sought a warrant it could have been issued with the same limitations, did not validate their conduct. The Court refused to sanction the surveillance because the agents made no attempt to obtain a warrant.

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing

> probable cause," for the Constitution requires "that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." 389 U.S. at 356-357. (Citations omitted).

Katz thus establishes a two-part test for determining whether a person is entitled to Fourth Amendment protection in a particular situation, as stated by Justice Harlan in his concurring opinion:

> * * * first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." 389 U.S. at 361 (Harlan, J., concurring).

Applied to a person's residence, Justice Harlan continued:

> Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. *Ibid.*

In *Smith* v. *Maryland*, 442 U.S. 735 (1979) the Court considered whether the warrant requirement was applicable to a pen register, installed on telephone company property at the company's central offices, and utilized to establish a call from the defendant's phone to that of a robbery victim, which later was used to obtain a search warrant for the defendant's residence. In finding that no warrant was required, 442 U.S. at 746-747, the governing principles of *Katz* were reaffirmed:

> [T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable" or a "legitimate expectation of

> privacy" that has been invaded by government action. 442 U.S. at 740.[8]

And, citing Justice Harlan's statement of the test set forth above, the Court observed again that the Fourth Amendment inquiry is premised upon two separate questions:

> The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," * * *. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable' " * * *. *Ibid.* (Citations omitted).

In reaching its conclusion that use of a pen register is not a search, the Court found that there was no expectation of privacy in the numbers which telephone users dial.

> Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. 442 U.S. at 743.

Therefore, the fact that the defendant used the telephone in his home was irrelevant, because

> [r]egardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would. *Ibid.*

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[8] See also, *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978); *United States* v. *Payner*, 447 U.S. 727, 731 (1980); *United States* v. *Salvucci*, 448 U.S. 83, 91-2 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980).

The Court also found that the defendant could not meet the second *Katz* requirement that his expectation of privacy be one that society would recognize as reasonable. *Ibid.* Following precedent that there is no legitimate expectation of privacy in information voluntarily turned over to third parties,[9] the Court found that because the defendant voluntarily conveyed to the telephone company the numbers that he dialed, he assumed the risk that the company would turn those numbers over the the police. 442 U.S. at 744.

The government distinguishes *Katz* and asserts that *Smith* v. *Maryland* is controlling by noting that a beeper does not intercept nor record conversations, and only reveals the location of the object to which it is attached.[10] These observations admit of simplicity, but are no answer to the question which this Court faces.

In *Katz*, the focus was upon the subjective intent of the defendant — to exclude the "uninvited ear" when he entered the phone booth to make his calls. 389 U.S. at 352. Similarly here, Respondent had the right to subjectively assume that the functional equivalent of an "uninvited eye" was not watching when the chemical drum was placed under a barrel at his secluded cabin, obviously to keep it from public view; he also had the right to assume that the drum would not "broadcast" its location to the police. Although there may be a difference in

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[9] The validity of those cases is clearly not in dispute here. But cf. *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 329 (1979): "[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees."

[10] Br. U.S. at 18.

degree between the monitoring here and in *Katz*, there is none in substance for both cases involve things which the defendant legitimately expected to remain private. And, since the government does not claim that society does not recognize as reasonable an expectation of privacy in non-contraband property at one's own residence, *Katz* mandates the result which Respondent maintains.

Unlike *Smith* v. *Maryland*, Respondent did not have any reason to expect that the presence of the chemical drum at his premises would be revealed to anyone, whereas Smith did as to numbers he dialed. Its presence was certainly not voluntarily revealed, as the numbers dialed by Smith were, and the only risk assumed by Respondent was that Petschen would tell someone the drum had been delivered; he certainly had the right to expect that the drum itself would not "broadcast" its location. Although a beeper may relay only "limited information", the distinction between it and a pen register is that no person has any reason to believe that a drum of chemicals will transmit any information to a third party; the same is obviously not true of a telephone. Finally, although the "limited information" argument has superficial appeal, the content of the monitoring has relevance only to the extent that it bears upon the existence of a legitimate expectation of privacy; once that expectation is established, the contents of the communications are irrelevant.[11]

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[11] See *Smith* v. *Maryland*, 442 U.S. 735, 741-2 (1979).

To use an extreme example, there would presumably be no expectation of privacy in the contents of a person's statements into an operative loudspeaker system at a secluded mountain retreat. Presumably there would be, however, in his whispered statements to a companion at a rock concert.

The government also claims that the Court of Appeals overlooked the conclusion of *Smith* v. *Maryland* that Smith's expectation of privacy could not depend on the fortuity of whether the telephone company chose to record or not record numbers dialed from local calls.[12] The point which the government overlooks, however, is the fact that Smith

> voluntarily conveyed to (the phone company) information that it had facilities for recording and that it was free to record. In these circumstances, (Smith) assumed the risk that the information would be divulged to the police. 442 U.S. at 745.

Contrariwise, Respondent voluntarily conveyed nothing, and assumed no risk other than that noted above. And, at the risk of repetition, the issue is not whether Respondent had an expectation of privacy in Petschen's arrival at his cabin:[13] it is whether he had an expectation of privacy in non-contraband property located at his residence.[14] The question itself should suggest the answer.

The government next examines "similar, but more traditional law enforcement surveillance methods", essentially concluding that there is no expectation of

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[12] Br. U.S. at 23.

[13] Br. U.S. at 24.

[14] The government asserts, Br. U.S. at 24 n. 12, that Respondent's choice of a rural, secluded cabin has no bearing on the applicability of the Fourth Amendment. As *Katz* and *Smith* v. *Maryland* teach, however, a person's subjective expectation of privacy is part of the two part test, and his choice of location is probative of his subjective intent.

privacy in activities which are exposed to public view.[15] We have no quarrel with this general proposition, and also agree that the warrantless use of a beeper to assist visual surveillance of another person does not violate a defendant's Fourth Amendment rights.[16] However, this concession does not affect the validity of our position here, which is that use of a beeper to ascertain the location of non-contraband property on private premises is a search subject to the warrant requirement of the Fourth Amendment. This involves an issue different from the "surveillance assistance" cases, and involves monitoring which is more intrusive than merely ascertaining the arrival of Petschen's vehicle at Respondent's premises. This distinction is precisely that drawn by the Court of Appeals, 662 F.2d at 517, and the government errs in asserting that the distinction could not validly be drawn.[17]

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[15] Br. U.S. at 19. When a person's activities within his home are involved, however, there may be a Fourth Amendment violation by the use of "enhanced vision" devices. See, *United States* v. *Taborda*, 635 F.2d 131, 139 (2nd Cir. 1980) (warrantless use of binoculars may violate Fourth Amendment).

[16] The cases cited by the government, Br. U.S. at 21, stand for that proposition, one which we have conceded below. See also, *United States* v. *Hufford*, 539 F.2d 32, 34-35 (9th Cir.), *cert. den.* 429 U.S. 1002 (1976); *United States* v. *Brock*, 667 F.2d 1311, 1319 n. 5 (9th Cir. 1982).

But see 1 W. LaFave, *Search and Seizure*, Section 2.7 at 423 (1978) (hereinafter: LaFave):

> The unrestrained utilization of electronic tracking devices to monitor the movements of anyone who travels from one place to another would be intolerable, and this is precisely why the use of beepers must be characterized as a search and subjected to Fourth Amendment restraints. (ffn. omitted).

[17] Br. U.S. at 22.

The government relies on several cases in support of their position that the Court of Appeals reached the wrong conclusion in this case.[18] Although these cases do support a contrary view of the issue here involved, they are also distinguishable. In *United States* v. *Hufford*, 539 F.2d 32 (9th Cir.), cert. den. 429 U.S. 1002 (1976), the Court held that installation of the beeper into the chemical drum was a search, but the defendant had no expectation of privacy. 539 F.2d at 33. It approved use of the beeper only to assist surveillance, which apparently was continuous, and noted that the defendant did have an expectation of privacy in the pickup which transported the drum and also in the garage where the pickup containing the drum was ultimately parked. 539 F.2d at 34. Contrary to the government's assertion,[19] the Ninth Circuit did not confront an identical argument to that made in the Court of Appeals here; *Hufford* only determined that warrantless use of the beeper to augment visual surveillance in following the defendant to the rental garage did not violate the Fourth Amendment. *Ibid.*

In *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) and *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), cert. den. ____ U.S. ____, 102 S.Ct. 1617 (1982), the beepers were both installed in packages containing contraband—heroin—which has been held to be a distinguishing feature.[20] In both cases, the beeper was utilized

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[18] Br. U.S. at 22-23.

[19] Br. U.S. at 24.

[20] See, *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n. 6 and cases cited (8th Cir.), *cert. den.* 444 U.S. 847 (1979); *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *United States* v. *Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978).

to ascertain the opening of the package after the defendant had been followed to a particular location with it; in neither case does it appear that agents lost visual sight of the defendant and thus the subject package during surveillance. Although we submit that the analysis in these cases is incorrect in light of this Court's prior decisions, the cases still are distinguishable because the beepers were not used to determine the location of non-contraband property at a defendant's residence, which could not be determined without use of the beeper. In contradistinction, without utilizing the beeper here, the agents could not determine where Petschen went after losing visual and electronic contact with him, could not have seen the chemical drum on Respondent's premises, and thus the beeper was clearly used for more than assisting surveillance. The beeper did not, as the government claims, "allow the agents to do better what they could do anyhow";[21] it allowed them to do something which they could not do without the beeper—determine the ultimate location of the drum. They (did not and) could not determine where Petschen had gone without using the beeper, and certainly could not determine that the drum was

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[21] Br. U.S. at 25.

The government also analogizes to cases where conversations between defendants and government agents have been electronically recorded and no Fourth Amendment violation has been found. The result in those cases, however, is based upon the defendant's consent to the conversation and his assuming the risk that the person to whom he speaks will record it. See, *Lopez* v. *United States*, 373 U.S. 427, 439 (1963); *United States* v. *White*, 401 U.S. 745, 752 (1971). See also, *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966). For these reasons, the use of beepers on informants has been approved. See e.g., *United States* v. *Kurck*, 552 F.2d 1320 (8th Cir. 1977); *United States* v. *Arredondo-Morales*, 624 F.2d 681, 684 (5th Cir. 1980).

present three days later on Respondent's property, when the warrant was obtained, without using the beeper. Thus even if they could have followed Petschen to Respondent's cabin, they had no way of determining whether the chemicals were still present at a later time, and without that information could not have obtained a warrant.

The government also claims that the location of the chemical drum could have been obtained merely by watching Petchen's vehicle turn into Respondent's driveway;[22] that claim is unfounded too, for even with constant surveillance the agents would not have known whether the chemical drum left the next day when Petschen did (Tr. 108, 110); was transported away in some other vehicle where it could have been concealed; or was moved from the property without a vehicle. The beeper was absolutely necessary to determine the presence of the chemical drum; absent physical entry, it could not be determined any other way.

The government finally asserts that merely because the beeper "trespassed" on Respondent's property a search and seizure is not involved.[23] As we have already recognized, the application of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz* v. *United States*, supra, 389 U.S. at 353. This does not mean, however, that consideration of a person's property interest is

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[22] Br. U.S. at 26.

[23] Br. U.S. at 27. The observations made by the revenue officers in Mr. Hester's "open fields" are clearly distinguishable from the beeper monitoring here. *Hester* v. *United States*, 265 U.S. 57, 59 (1924).

not relevant to the legitimate expectation of privacy analysis.

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. * * * [B]y focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not all together abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that amendment. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n. 12 (1978).

Within the context of this case, we agree that Respondent had no legitimate expectation of privacy in the arrival of Petschen's vehicle. But as we have stated repeatedly, the arrival of Petschen's vehicle is not the issue with which we are concerned; nor was the beeper utilized to determine that event. The government's observations are therefore irrelevant.

The Court of Appeals relied on two other Circuit decisions which are useful to this Court's analysis here. In *United States* v. *Moore*, 562 F.2d 106 (1st Cir.), cert. den. 435 U.S. 926 (1977), on remand, 469 F.Supp. 953 (D. Mass. 1977), agents placed a beeper within a box of chemicals with the permission of the chemical company, and also attached beepers to two vehicles used by co-defendants, at different times, to pick up all the chemicals necessary to produce phencyclidine. Using the beepers to assist their surveillance, they followed the defendants to a certain home, observed them carry the box of chemicals

inside, and for a following two week period, the beeper within the box of chemicals was utilized to confirm the continued presence of the chemicals, as did continued surveillance of the house.

The Court of Appeals found that attachment of beepers to vehicles involved no expectation of privacy because automobiles have decreased Fourth Amendment protection, the vehicle beepers were only used to track the vehicles, and the agents had probable cause at the time. 562 F.2d at 112-113. As to the beeper within the box of chemicals, however, the *Moore* Court found a Fourth Amendment violation.

> When defendants withdrew from public view, taking the box of chemicals inside with them, they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the government. Doubtless the limited data transmitted by a beeper was far less revealing than the conversation recorded in *Katz;* the level of intrusion was less severe. Still, as the chemicals containing the transmitter were not contraband or otherwise wrongfully in (defendants') possession, the government had no right to determine their continued presence in the house by use of warrantless electronic surveillance. 516 F.2d at 113.[24]

In *United States* v. *Bailey*, 628 F.2d 938 (6th Cir. 1980), a DEA beeper was installed, pursuant to court order, in a chemical drum ordered by a defendant for use in producing phencyclidine. Through visual and electronic surveill-

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[24] Accord, *North Carolina* v. *Hendricks*, 43 N.C.App. 245, 258 S.E.2d 872, 880 (1979), *cert. den.* 299 N.C. 123, 262 S.E.2d 6 (1980). Professor La Fave has observed that the *Moore* Court's conclusion was "doubtless correct." LaFave, supra n. 16, at 430.

ance, agents followed the drum to an apartment and utilized the beeper to monitor its presence. The drum was moved, however, and several days later its new location at another apartment was discovered through use of the beeper. Periodic monitoring for an approximate two month period confirmed the beeper's presence at the second location; when the signal weakened, agents obtained a warrant and searched the premises.

The Court of Appeals found no violation in the installation of the beeper. 628 F.2d at 943. Applying the *Katz* test to monitoring of the beeper, the Court found that the defendants exhibited a subjective expectation of privacy with respect to the chemical drum by maintaining it in two separate buildings for over two months.

> [T]he defendants maintained chemicals in private areas that were shielded from public view and protected against warrantless government searches. This being so, they exhibited an expectation of privacy in the location of chemicals which, but for the beeper surveillance, would have been entirely justified. 628 F.2d at 943-944.

Turning to the second part of the *Katz* analysis, the Court also found that the defendants' subjective expectation of privacy was one that the law is prepared to protect. Following *United States* v. *Moore*, supra, the Sixth Circuit found Fourth Amendment protection against warrantless searches for legitimately-owned, non-contraband items, even if the probable use of the items is to make illegal drugs.

> In essence, the question before the court is whether the law is prepared to recognize as legitimate an individual's expectation of privacy with respect to what he does in private with personal property he had a right to possess. The question is its own answer. Beeper surveillance of non-contraband per-

> sonal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the Fourth Amendment. 628 F.2d at 944.[25]

Having thus found the beeper monitoring to constitute a search, the Court invalidated the warrant because of failure to place a time limit on beeper surveillance.

Both *Moore*[26] and *Bailey*[27] rely on the *Katz* test. As did the Court of Appeals here, they properly draw the "surveillance assistance" versus "location monitoring" distinction, and quite reasonably hold that at a person's residence he reasonably expects that government agents will not, without a warrant, utilize a beeper to determine the (continued) presence of property which it is lawful to possess, and that society recognizes that expectation as reasonable. We submit that this proper view of the Constitution should not be disturbed.

B. 1. "Reasonableness" under the Fourth Amendment cannot be determined without reference to the warrant clause.

The government takes the secondary position that if monitoring of the beeper was a search it was a minimally intrusive one, outweighed by the substantial governmental interest in controlling drug trafficking, and therefore was reasonable under the Fourth Amendment.[28] Once

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[25] *Bailey* was re-affirmed in *United States* v. *Cassity*, 631 F.2d 461, 465 (6th Cir. 1980).

[26] 562 F.2d at 110.

[27] 628 F.2d at 943.

[28] Br. U.S. at 31. Their argument is one which was not urged upon the district court, Court of Appeals, nor in the Petition for Rehearing. This Court may therefore decline to consider it. *United States* v.

again, the government treats the issue as involving Petschen's arrival at Respondent's cabin,[29] not use of the beeper to determine the location of the chemical drum at Respondent's premises, which, again, was the issue decided by the Court of Appeals. 662 F.2d at 517.

The government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment. It is well-established that searches without prior judicial authorization are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, supra, 389 U.S. at 357 (f'n. omitted); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978); *Robbins* v. *California*, 453 U.S. 420, 423 (1981).[30] In no area is this rule more scrupulously

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Lovasco, 431 U.S. 783, 788, n. 7 and cases cited (1977); *United States* v. *Mendenhall*, 446 U.S. 544, 551, n. 5 and cases cited (1980).

[29] Br. U.S. at 28, 31.

[30] The government has not claimed that any of the exceptions to the warrant requirement are applicable here, and it is clear that none are. See, *United States* v. *Ross*, 456 U.S. ____, ____, 102 S.Ct. 2157, 2163-64 (1982) (Automobile - list of cases);

New York v. *Belton*, 453 U.S. 454, 457 (1981) (Search incident to arrest);

Michigan v. *Tyler*, 436 U.S. 499, 509 (1978) (Emergency - burning building);

Schneckloth v. *Bustamonte*, 412 U.S. 218, 227 (1973) (Consent);

Coolidge v. *New Hampshire*, 403 U.S. 443, 465-66 (1971) (Plain view);

Warden v. *Hayden*, 387 U.S. 294, 298-300 (1967) (Hot Pursuit - fleeing felon);

Ker v. *California*, 374 U.S. 23, 42 (1963) (Exigent circumstances - destruction of evidence).

guarded than in the context of a person's home, privacy in which lies at the very core of the Fourth Amendment. *Steagald* v. *United States* 451 U.S. 204, 211-12 (1981); *Payton* v. *New York*, 445 U.S. 573, 590 (1980); *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948); *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925); *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

Thus, the fact that the government has not considered the warrant clause in its discussion of reasonableness is fatal to the argument. "The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). It is improper to judge a search in a given case only in terms of reasonableness, without reference to the warrant clause. *United States* v. *United States District Court*, 407 U.S. 297, 315 (1972); *Chimel* v. *California*, 395 U.S. 752, 764-5 (1969).

It is clear that monitoring of the beeper does not admit of analogy to the cases relied upon by the government. It cannot be properly called a stop, *Terry v. Ohio*, 392 U.S. 1 (1968), *Brown* v. *Texas*, 443 U.S. 47 (1979); a border stop, *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); and it cannot be determined not to involve a search or seizure at all. *United States* v. *Mendenhall*, 446 U.S. 544 (1980). The beeper, monitored on Respondent's property, broadcast the location of his private property and is the functional equivalent of an agent positioned on that property, transmitting or signalling to his cohorts the pres-

ence of the drum containing the chemicals.[31] To call the beeper monitoring anything other than a search makes neither practical nor forensic sense.

A cursory reading of the cases upon which the government relies also shows them to be distinguishable because they involved police activity not susceptible to the use of a warrant. *Terry*, 392 U.S. at 20, and *Martinez-Fuerte*, 428 U.S. at 565, specifically disclaim applicability of the warrant clause because its application was not practicable and Fourth Amendment interests would not be advanced. The warrant clause was not applicable in *Brown* v. *Texas* or *Brignoni-Ponce* for presumably the same reasons: the former involved a "street encounter" as in *Terry*; the latter a "roving border stop" involving a limited intrusion by temporary detention. *Mendenhall*, of course, does not involve a seizure at all, 446 U.S. at 555, and thus no intrusion on privacy occurred.

The remaining case cited by the government is *United States* v. *Michael*, 546 F.2d 252 (5th Cir.) (en banc), cert. den. 454 U.S. 950 (1981), where a badly divided court held that "reasonable suspicion" was the appropriate factual standard permitting the warrantless installation of a

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[31] As Justice Douglas observed:

> If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy. *Berger* v. *State of New York*, 388 U.S. 41, 65 (1967) (Douglas, J., concurring in judgment).

beeper on a motor vehicle parked in a public place. 645 F.2d at 256, 257. Monitoring of the beeper resulted in agents following the defendant to a warehouse where illegal drugs, chemicals and equipment were ultimately seized pursuant to warrant. Since "[t]he beeper only aided the agents in the performance of their lawful surveillance (and) [t]he van travelled public roads and was exposed to public view", there was no violation of Fourth Amendment rights. 645 F.2d at 258.

Although it is not clear from the opinion, *Michael* appears to be another "surveillance assistance" case. Even if it was not, however, the decision errs in failure to consider the warrant clause, as pointed out by the dissent. 645 F.2d at 265 and n. 7 (Tate, J., dissenting). The government fails to recognize this deficiency, however, and asserts that use of a beeper to "locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot."[32] They cite no authority for this proposition other than *Michael;* as the dissenters cogently observe, no other case has allowed beeper surveillance under such a minimal standard. 645 F.2d at 263 (Tate, J., dissenting), 272 (Godbold, C. J., dissenting).[33]

Distilled to its essence, the government's argument is that society's interest in apprehending drug traffickers is

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[32] Br. U.S. at 31.

[33] LaFave, supra n. 16 at 431-2, observes that:

> As for the grounds needed to justify surveillance by an electronic tracking device, the courts have rather consistently assumed that the traditional quantum of probable cause required for full searches is needed in this context. * * * [I]t does not seem 'that a standard less than probable cause would be warranted' in this context. (ffn. omitted).

so great that the minimal intrusion of monitoring a beeper which announces only its location should be allowed on less than probable cause to believe that a person is committing a crime, even though the intrusion takes place at his personal residence.

This Court has recognized repeatedly, however, that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, supra, 407 U.S. at 313. See, *Payton* v. *New York*, supra, 445 U.S. at 585; *Michigan* v. *Summers*, 452 U.S. 692, 701 n. 13 (1981). Without probable cause and without the warrant requirement, there would be absolutely no limitation whatever on the use of beepers to monitor the activities of citizens, law-abiding or not.[34] No way to limit their placement, location or duration would exist, and if monitoring resulted in the discovery of criminal activity, "reasonable suspicion" is not a difficult standard to meet. The private lives of citizens should not be subject to monitoring at the whim of the police.

2. Requiring A Warrant For Utilization Of A Beeper Advances Fourth Amendment Interests And Is Not Unreasonable.

The government's final position is that even if probable cause is required for beeper surveillance, no warrant should be required because the purposes advanced by generally requiring judicial authorization before execut-

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[34] As Justice Marshall observed in a similar vein:

> Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. *Smith* v. *Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting).

ing a search are not applicable to use of a beeper.[35] The arguments supporting this assertion are, upon analysis, unsound.

The primary reason for requiring warrants is to insure that the privacy of the citizenry is not invaded without an objective determination that there is a sufficient basis for doing so. Inferences from facts relied upon to establish probable cause are to "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, supra, 333 U.S. at 14 (fn. omitted); *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977). The government recognizes this function of the warrant,[36] and obviously it is fostered by the result reached by the Court of Appeals.

Second, through the particularization requirement, a warrant prevents indiscriminate searches and seizures and limits abuse of the searching officers' authority. *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); *Marron* v. *United States*, 275 U.S. 192, 196 (1927). In the case of a beeper, the warrant requirement would prevent installation in or monitoring of items which are clearly private and non-criminal in nature, and would preclude monitoring where, after proper installation, it appears that the item is not being used nor is it intended for use in criminal activity. The warrant requirement would also prevent authorities from conducting unsupervised surveillance for an inordinate period of time. Unchecked monitoring allows government agents to keep track of persons and property for any period of time desired; it can scarcely be

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[35] Br. U.S. at 33. See n. 28, supra.

[36] Br. U.S. at 36.

argued that this is an insignificant invasion of privacy. *Berger* v. *State of New York*, 388 U.S. 41, 59-60 (1967); *United States* v. *Bailey*, supra, 628 F.2d at 945.[37]

Finally, "a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, supra, 433 U.S. at 9; *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967). The government correctly observes that this purpose cannot be advanced by the warrant requirement because of the necessity of clandestine installation and monitoring.[38] After monitoring has terminated, however, these purposes can still be accomplished. Cf. *United States* v. *Donovan*, 429 U.S. 413, 429 n. 19 (1977) (Post-intercept inventory satisfied constitutional requirement). Post-monitoring notice has the salutary effect of assuring citizens, whether criminal or not, that they have not been searched without the approval of a judge. For the same reasons, "post-search judicial review" is not adequate to control beeper surveillance abuses, as claimed by the government.[39] Post-search review will only be available to presumptively guilty parties; the

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[37] Although the government, Br. U.S. at 37-8, cites *Dalia* v. *United States*, 441 U.S. 238, 257 (1979) correctly, the language appears within the context of special authority in a Title III warrant, 18 U.S.C. § 2518, to make covert entry to install an eavesdropping device, which was held required neither by the Constitution nor by statute. Nothing in *Dalia* suggests that electronic surveillance should not carefully be circumscribed and regulated by the court; in fact the obverse is true. 441 U.S. at 249-250 and nn. 9, 11.

[38] Br. U.S. at 36.

[39] Br. U.S. at 39.

innocent person whose privacy is invaded will have no remedy whatever. Judicial control over the use of beepers to conduct surveillance is thus the only practical way to prevent abuses from the beginning.

The government next claims that application of the warrant requirement to beeper surveillance is unjustified by the resulting financial expense and decreased police efficiency resulting either from compliance with or justification of the failure to comply with the warrant procedure.[40] The government's fears, assuming them to be relevant, simply are not justified by logic or common sense. If beeper warrants were so expensive, it is doubtful that in a greater number of reported cases then not, beeper warrants would have been obtained.[41] Second, it is shear folly to suggest that preparing and obtaining a warrant requires a great expenditure of time. An experienced police officer can easily type and have a judge sign a warrant within an hour, and oftentimes less. And, in cases where beepers are utilized, the investigation is often wide-ranging and lengthy, and obtaining a beeper warrant might mean nothing more than an hour of nonduplicative surveillance at no additional cost. Third, in cases where there is a beeper warrant, there will be no necessity for a pretrial eveidentiary hearing to determine probable cause, as the determination can be made upon the face of the affidavit.[42] When this fact is considered together with the preference accorded to warrants in "doubtful or marginal cases", *United States* v. *Ventresca*,

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[40] Br. U.S. at 39.

[41] See n. 5, supra.

[42] E.g. *Stone* v. *Powell*, 428 U.S. 465, 473 n. 3 (1976); *Whiteley* v. *Warden*, 401 U.S. 560, 565 n. 8 (1971); *Aguilar* v. *Texas*, 378 U.S. 108, 109 n. 1 (1964).

380 U.S. 102, 109 (1965), it is likely that the time of the police will be conserved instead of further taxed. In any event,

> the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.* * * The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. *Mincey* v. *Arizona*, supra, 437 U.S. at 393. (Citations omitted).

Finally, the government alleges that judges would denigrate their warrant-issuing authority if required to deal with "police practices which present only a 'minor peril to Fourth Amendment protections'. . ."[43] That, of course, is a danger which exists in the courtrooms of all busy judges. The danger of ascribing to such a philosophy was eloquently recognized nearly a century ago.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from the legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their effica-

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[43] Br. U.S. at 39. The government cites LaFave, supra n. 16, but fails to include the last sentence of the paragraph cited: "However, this position has not as yet received attention from the courts." In addition, the quotation appears in reference to a position advocating the applicability of the warrant requirement to the use of dogs to sniff out drugs or explosives.

> cy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. *Boyd* v. *United States*, supra, 116 U.S. at 635.

CONCLUSION

Respondent respectfully submits that the Court of Appeals has not erred in its application of fundamental Fourth Amendment law, and its decision should be affirmed.

Respectfully submitted,

MARK W. PETERSON
FRIEDBERG & PETERSON
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626
Court-appointed Counsel for Respondent

Petitioner's Reply Brief

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No. 81-1802

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

LEROY CARLTON KNOTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. The basic question in this case is whether law enforcement agents are constitutionally required to obtain a warrant in order to ascertain the location of an item to which a beeper has been attached. Respondent, however, repeatedly asserts (Br. 5, 11, 17) that the case presents a much narrower question, limited to the warrantless monitoring of beepers located at a person's residence. In respondent's view (Br. 17-18), a warrant is required in the latter situation but not when a beeper is used solely to assist the police in keeping track of the movement of a vehicle or container on public roads.

The issue before the Court cannot reasonably be limited in the way respondent suggests because, in any given case, the officers will have no way of knowing in advance whether the item to which the beeper has been attached (be it an automobile, an airplane, or a can of chemicals) will come to rest within an area not accessible to the public. Indeed, as

we pointed out in our opening brief (at 37; footnote omitted), "the whole purpose for undertaking this type of surveillance is to locate the beeper's unknown destination." Thus, if respondent's argument is accepted, law enforcement authorities will, as a practical matter, be required to obtain a warrant in every case in which they seek to use a beeper to aid in the investigation of suspected criminal activity.

2. Respondent argues (Br. 9-10) that without the restrictions imposed by a warrant requirement, government agents would be free to monitor the movements and location of any person at any time and for an unlimited period of time. In respondent's opinion, because the use of beepers makes law enforcement more efficient, the protections afforded by warrants are necessary to safeguard the citizenry against possible future abuses of this technology by law enforcement officers.

We do not question that the use of a beeper as an aid in following a suspect's movements enables law enforcement officers to do their job more effectively. For example, if the police were limited solely to visual surveillance they would run the risk of being detected by the suspect in the course of his travels; this would defeat the purpose for the surveillance, for the suspect could then take evasive maneuvers or alter his destination. It is not uncommon, particularly in investigations of sophisticated drug rings or other organized criminal syndicates, for government agents to find themselves being subjected to countersurveillance. See, e.g., *United States* v. *New York Telephone Co.*, 434 U.S. 159, 163 n.2 (1977); *United States* v. *Fleishman*, 684 F.2d 1329, 1333, 1335 (9th Cir. 1982); *United States* v. *Maher*, 645 F.2d 780, 781, 783-784 (9th Cir. 1981); *United States* v. *Bernard*, 623 F.2d 551, 553 & n.5 (9th Cir. 1979); *United States* v. *Cacace*, 529 F.2d 1167, 1168 (5th Cir.), cert. denied, 429 U.S. 841 (1976). Beepers serve the valuable

function of permitting the agents to acquire the same information about a suspect's public travels that they could have acquired through direct visual surveillance, while themselves avoiding detection.

Although it is clear that beepers are a valuable law enforcement tool, it does not follow that warrants are necessary to protect against possible abuses of beepers by the police. Respondent's contrary contention is fundamentally at odds with the "expectation of privacy" analysis that is central to modern Fourth Amendment jurisprudence. Indeed, virtually identical arguments were rejected by this Court in *Smith* v. *Maryland*, 442 U.S. 735 (1979), and *United States* v. *Miller*, 425 U.S. 435 (1976).

In *Smith*, the Court held that the use of a pen register to record the numbers dialed on an individual's telephone is not a "search" within the Fourth Amendment, despite the dissenters' argument that "[t]he prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide." 442 U.S. at 751 (Marshall, J., dissenting).[1] See also *id.* at 748 (Stewart, J., dissenting). Similarly, in *Miller*, the Court concluded

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[1]In his dissent, Justice Marshall elaborated on this point (442 U.S. at 751; footnote omitted):

> Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. See *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958); *Branzburg* v. *Hayes*, 408 U.S. 665, 695 (1972); *id.*, at 728-734 (Stewart, J., dissenting). Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity, I am unwilling to insulate use of pen registers from independent judicial review.

that the acquisition by the government of copies of an individual's bank records by means of a subpoena duces tecum served on the banks at which the individual had accounts was not subject to Fourth Amendment scrutiny. In so ruling, the Court rejected the argument that " '[t]o permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power." '425 U.S. at 451 (Brennan, J., dissenting), quoting *Burrows* v. *Superior Court*, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974).

Whatever concerns there might be about promiscuous use of beeper technology to track the movement of containers or vehicles are dwarfed by those that arise from the prospect of police monitoring the banking transactions or telephone calls of every citizen. Nevertheless, as a majority of the Court implicitly recognized in *Smith* and *Miller*, proper Fourth Amendment analysis does not turn on a determination whether, if a particular law enforcement practice were taken to an extreme, the result would be obnoxious to the fundamental values of a free society. If, as respondent seems to suggest, this is the proper inquiry, there would never be occasion for the Court to engage in an "expectation of privacy" analysis. Instead, the focus would be on whether it is possible to conjure up situations in which the police might engage in abuses of a particular practice. But almost any practice is, at least in theory, subject to abuse. For example, if a policeman walking along a street were to look inside the open windows of a house and observe a crime being committed, no one would seriously argue that the officer had conducted a search of the premises requiring a warrant, because the activities going on inside the house were exposed to public view. Using

respondent's approach, it is possible to imagine police authorities stationing officers outside of every house in a particular neighborhood, or at houses selected at random, in the hope of observing criminal activity inside. Such surveillance would surely be distasteful, but it would not thereby be transformed into a search subject to regulation under the Fourth Amendment. As we pointed out in our opening brief (at 20-21 n.10), if abuses such as these arise, they may be subject to regulation under other constitutional provisions, or they may be dealt with through legislation.

At bottom, respondent's argument reflects the view that our governmental institutions are incapable of controlling abuses of police activities if virtually all facets of those activities are not held to be subject to prior judicial scrutiny under the Fourth Amendment. The exceedingly pessimistic vision that respondent conjures up is in fact far removed from the realities of contemporary American society.[2] Moreover, recent history belies respondent's point of view that this Court must discard its traditional Fourth Amendment analysis in order to safeguard a free society. Thus, following this Court's decision in *United States* v. *Miller, supra*, Congress enacted the Right to Financial Privacy

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[2]A similar specter of abuses was presented to the Court in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), where it was argued that the Fourth Amendment required affirmance because a contrary result might lead to official attempts to intimidate the press by abuse of search powers. Noting that very few instances had been cited "involving the issuance of warrants for searching newspaper premises," the Court stated that "[t]his reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it." *Id.* at 566. The Court's discussion in *Stanford Daily* supports our contention that speculative consideration of possible abuses by the police is no substitute for traditional Fourth Amendment analysis. In fact, subsequent events have shown that the specter of widespread abuses cited to the Court in *Stanford Daily* has not materialized. Neither is it even remotely likely that reversal in this case could lead to widespread use of beepers to track the movements of substantial segments of our citizenry.

Act of 1978, Pub. L. No. 95-630, Title XI, 92 Stat. 3697 *et seq.*, in order "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. Rep. No. 95-1383, 95th Cong., 2d Sess. 33 (1978). The House Report explicitly stated (*id.* at 34) that the legislation

> is a congressional response to the Supreme Court decision in * * * *United States* v. *Miller* which held that a customer of a financial institution has no standing under the Constitution to contest Government access to financial records. * * * [W]hile the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution.

In short, the Fourth Amendment cannot properly be invoked to condemn legitimate police investigative techniques on the ground that such techniques might be subject to abuse in a hypothetical case. Rather, it is necessary to examine the nature of the information disclosed by the particular law enforcement practice in order to determine whether its use infringes a legitimate expectation of privacy.

3. As we explained in some detail in our opening brief (at 18-27), the use of the beeper in this case did not disclose information as to which respondent may claim a legitimate privacy interest. Except with regard to movement from place to place within the interior of private premises, a citizen's location and movements (including his arrival at private premises) are ordinarily events to which no cognizable privacy right attaches. This is so because such matters are not in their nature private and indeed can be ascertained by law enforcement officers without the assistance of a beeper, by utilizing such means as visual surveillance, radar, bloodhounds, or other similar methods.

a. In this case, no invasion of either respondent's or Petschen's privacy would have occurred had the agents determined that the can of chloroform was present on respondent's property by maintaining continuous visual surveillance of Petschen's vehicle until it turned onto respondent's driveway. Thus, respondent errs in asserting (Br. 16; emphasis added) that "the only risk assumed by Respondent was that Petschen *would tell someone* the drum had been delivered * * *." While respondent's selection of a remote location for the clandestine laboratory may have been calculated to keep private his illicit drug manufacturing activities inside his cabin, he could not reasonably have expected to preserve as private the arrival on his property of co-conspirators who reached that destination by travelling over public roads.

Moreover, respondent, like the court of appeals (Pet. App. 6a), further errs in asserting (Resp. Br. 20) that the monitoring of the beeper became a "search" merely because the agents did not *actually* maintain continuous visual surveillance of Petschen's vehicle until it arrived at respondent's property. If the agents had kept Petschen in sight the beeper would have been entirely superfluous. In any case, it makes no sense to say that the determination whether an individual had a legitimate expectation of privacy in a particular situation turns on what the *agents* did or did not do. The inquiry instead must focus on what steps the *individual* took to maintain privacy and whether, given socially recognized norms, the individual reasonably could have expected that the information obtained by the police would be kept private.

b. Respondent repeatedly asserts (Br. 17, 18, 22) that the information disclosed by the beeper was not merely that Petschen had arrived at respondent's property, but also that the can of chemicals was "present" on his property. But the agents knew, from visual surveillance, that Petschen's automobile was carrying the chemicals. Clearly, then, the

distinction respondent attempts to draw is entirely without significance in the context of this case. The only information conveyed by the beeper was that the can of chemicals was located somewhere on respondent's property. This same information would have been obtained had the agents observed Petschen's arrival.

Respondent suggests (Br. 20-21), however, that the beeper was used to ascertain that the drum of chemicals was still present on his property at some later time, when the search warrant was obtained. This information, respondent asserts, would not have been disclosed by visual surveillance and, without the beeper, could not have been determined absent a physical entry onto his property. But the record shows only that, approximately one hour after the agents discontinued visual surveillance of Petschen's vehicle, the agents located the beeper's signals as coming from somewhere on respondent's property (J.A. 10, 28-29). This information, together with other information previously known to the authorities, provided probable cause to believe that respondent was operating an illegal drug laboratory at his cabin and thus supported the issuance of a warrant to search respondent's cabin and surrounding area for evidence of that operation.[3]

4. It bears emphasis that where, as here, agents conduct beeper surveillance, they may nevertheless not enter and search any private area for evidence of a crime until after they have obtained a search warrant issued by a neutral magistrate on the basis of probable cause. Respondent nonetheless argues (Br. 26-27, 30) that whenever a beeper broadcasts its location from inside a residence or some

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[3]Contrary to respondent's suggestion (Br. 15), the beeper did not reveal that the drum had been placed under a barrel near his cabin. The precise location of the drum was discovered by the agents when they executed the search warrant.

other private area, the warrant requirement of the Fourth Amendment must be strictly enforced. As already noted, however, the agents will not know whether the beeper is on private property—thus, in respondent's view, triggering the warrant requirement—until after they have monitored the beeper's signals. The record of this case, moreover, does not disclose whether the can of chemicals was inside respondent's cabin or otherwise out of public view at the time the beeper's signals were monitored. But even if the monitoring of a beeper that is broadcasting its location from private property is a "search" under the Fourth Amendment, the beeper discloses such limited information that, as we have argued in our main brief (at 28-40), neither probable cause nor a warrant should be required as a precondition of its use.

The Fourth Amendment ordinarily requires that a neutral magistrate must determine that there is probable cause to believe that evidence of criminal activity may be found at a particular residence before law enforcement officers may enter and conduct a search of the premises. One reason why the warrant requirement is strictly enforced in this situation is because it is inevitable that, in the course of searching private areas for specified items, the police will be exposed to a wide range of lawful private activity. Thus, the warrant requirement assures that significant breaches of the privacy of the home or other private areas will occur only when approved by a neutral judicial officer. In the case of a beeper, however, the information conveyed is so limited that any intrusion into legitimate privacy interests is qualitatively as well as quantitatively different from the intrusions

accompanying traditional searches that must be authorized by a warrant. Thus, it is reasonable to permit the police to monitor a beeper's signals without obtaining a warrant.[4]

For these reasons and those stated in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

DECEMBER 1982

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[4]Respondent asserts (Br. 9-10 n.5, 33) that warrants have been obtained in the majority of reported beeper cases in the courts of appeals. But in many of these cases, warrants were needed to authorize physical entry into a private area (such as the interior of an airplane) in order to install the beeper. Moreover, it cannot be suggested that the constitutionality vel non of a particular police practice turns on whether law enforcement officers have followed that practice in a majority of cases. If this were so, it surely would discourage the police from voluntarily adopting practices that are not constitutionally required. Cf. *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979).

DOJ-1982-12

Docket Sheet

NO. 81-1802-CFY Vide: 81-6089	TITLE	United States, Petitioner v. Leroy Carlton Knotts

DOCKETED	COURT
Mar. 29, 1982	United States Court of Appeals for the Eighth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent: Joseph S. Friedberg
Feb. 16, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until March 29, 1982 by Blackmun, J, Feb. 17, 1982.
Mar. 29, 1982	Petition for writ of certiorari filed. (Record filed).
May 3, 1982	Waiver of right to file a response to the petition filed.
May 5, 1982	DISTRIBUTED. 5-20. (Stricken)
May 14, 1982	Response requested.
May 28, 1982	Motion of respondent for leave to proceed in forma pauperis, and brief in opposition filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 9, 1982	Reply memorandum for the U. S. filed. (D).
June 21, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. petition GRANTED.

July 7, 1982	Motion of respondent for appointment of counsel (Mark W. Peterson, Esquire, of Minneapolis, Minnesota) filed.
July 7, 1982	DISTRIBUTED. SL7P5. (Above motion).
July 13, 1982	Motion of parties to dispense with printing the joint appendix filed.
July 14, 1982	DISTRIBUTED. SL9P4. (Above motion).
Aug. 4, 1982	Order extending time to file the petitioner's brief on the merits until Sept. 4, 1982.
Sept. 8, 1982	Order further extending time to file a response to the petition until Sept. 18, 1982.
Oct. 4, 1982	The motion for appointment of counsel is GRANTED and it is ordered that Mark W. Peterson, Esquire of Minneapolis, Minnesota, is appointed to serve as counsel for the respondent in this case. The motion of the parties to dispense with printing the joint appendix is DENIED.
Oct. 19, 1982	Order extending time to file the respondent's brief on the merits until Nov. 2, 1982.
Nov. 2, 1982	Brief for respondent filed.
*Sept. 21, 1982	Brief for the United States filed.
Nov. 17, 1982	Joint appendix filed.
	CIRCULATED
	(Over)

81-1802

Title

No.

DATE	PROCEEDINGS AND ORDERS
Dec. 1, 1982	Reply brief for the petitioner filed.
Dec. 6, 1982	ARGUED.